1-424 In United States District Court for the District of Columbia

Civil No. 5017-47

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DU PONT DE NEMOURS AND COMPANY, INC., DEFENDANT

Complaint

Filed December 13, 1947

To the Honorable the Judges of the District Court of the United States for the District of Columbia:

The United States of America, as plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendant under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Section 2 of the Sherman Act.

2. The corporate defendant, E. I. du Pont de Nemours and Company, Inc., has an office, transacts business, and is found within the District of Columbia.

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II. THE DEFENDANT

3. E. I. du Pont de Nemours and Company, Inc. (hereinafter referred to as "du Pont"), a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business at Wilmington, Delaware, is made a defendant herein. du Pont is successor to Du Pont Cellophane Company, Inc. (sometimes hereinafter referred to as "DCCI"), the latter having been dissolved in or about 1936, at which time its assets were transferred to and its contractual rights and obligations assumed by du Pont. At all times, DCCI was operated as a wholly owned subsidiary of du Pont Securities Corporation, in turn, a wholly owned subsidiary of du Pont. DCCI was the suc-

cessor to an earlier Du Pont Cellophane Company, Inc. (sometimes hereinafter referred to as "DCC") through reincorporation of the latter under the laws of the State of Delaware in or about 1929. DCC was incorporated under the laws of the State of Delaware in or about 1923, and, at all times up until the aforesaid reincorporation in 1929, du Pont owned in excess of fifty (50) per centum of its voting stock. During their corporate existences DCC and DCCI, respectively, entered into numerous contracts, agreements, arrangements and understandings, and did acts and things constituting part of the monopolization, attempt to monopolize, and combination and conspiracy to monopolize hereinafter alleged, and, at all times during said period, du Pont controlled the policies, operations and management of its subsidiaries described above. As hereinafter used the term "du Pont" includes DCC and DCCI as well as E. I. du Pont de Nemours and Company, Inc.

III. Co-Conspirators

4. LaCellophane, Societe Anonyme (hereinafter referred to as "La Cellophane"), a corporation organized and existing
426 under the laws of France, with offices and principal place of business at Paris, France, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. La Cellophane is the largest manufacturer of cellophane in France and is associated with the Comptoir des Textiles Artificiels (hereinafter referred to as "the Comptoir"), a French holding company controlling a number of manufacturers of cellulose products in Europe.

5. British Cellophane Limited (hereinafter referred to as "BCL"), a corporation organized and existing under the laws of the United Kingdom, with offices and principal place of business at London, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. BCL is the largest producer of cellophane in England and, throughout the period of time covered by the combination and conspiracy hereinafter alleged, has been a jointly owned subsidiary of La Cellophane and Courtaulds Limited, the largest rayon manufacturer in England.

6. Canadian Industries Limited (hereinafter referred to as "CIL"), a corporation organized and existing under the laws of the Dominion of Canada, with offices and principal place of business at Montreal, Canada, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. CIL is the largest manufacturer of cellophane in Canada. Throughout the period of time covered by the combination and conspiracy herein alleged, du Pont and Imperial

Chemical Industries, Ltd. have owned in equal shares from eighty-five (85) to ninety-five (95) per centum of the capital stock of CIL, and have controlled the management and policies of CIL.

7. Kalle & Co., A. G. (hereinafter referred to as "Kalle"), a corporation organized and existing under the laws of Ger-
427 many, with offices and principal place of business at Wiesbaden-Biebrich, Germany, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. At the advent of World War II, Kalle, a subsidiary of I. G. Farben Industries, A. G., was the largest producer of cellophane and cellulose caps and bands in Germany.

8. Societe de La Viscose Francaise, Societe Anonyme (hereinafter referred to as "Viscose Francaise"), a corporation organized and existing under the laws of France, with offices and principal place of business at Paris, France, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. Viscose Francaise is the largest manufacturer of cellulose caps and bands in France and is associated with the Comptoir. Viscose Francaise is successor in interest to the business of Societe Francaise des Crins Artificiels, which prior to its merger entered into contracts, arrangements and understandings with du Pont as part of the combination and conspiracy hereinafter alleged. Whenever the term Viscose Francaise is herein used, such term shall mean either Viscose Francaise or its predecessor Societe Francaise des Crins Artificiels.

9. Viscose Development Company Limited (hereinafter referred to as "VDC"), a corporation organized and existing under the laws of the United Kingdom, with offices and principal place of business at Bromley, Kent, England, is not made a defendant herein but is named as a co-conspirator and conspiracy alleged in this complaint. VDC is the largest manufacturer of cellulose caps and bands in England.

IV. The Products Involved

10. Cellophane is essentially regenerated cellulose, recovered from solutions of native cellulose, an abundant raw ma-
428 terial derived in the instant process from sulphite wood pulp. Viscose, the intermediate solution product, is also employed in the manufacture of caps and bands, sausage casings, cellulose sponges and rayon.

11. Cellophane is basically a thin, transparent sheet, primarily used for wrapping cigarettes, foodstuffs, and other consumer goods. It is also employed in the manufacture of decorative ornaments, and has numerous military purposes. Cellulose caps

and bands (hereinafter referred to by the term "caps and bands") are used principally as secondary bottle closures, particularly by the distillers industry. The characteristics of cellophane render it unique for its particular purposes.

12. Cellophane is manufactured by extruding viscose through a long, narrow slot into a chemical bath where it coagulates in the form of a thin sheet on a metal roller or plate. This sheet is then run through a succession of purifying baths, and, while still wet, is immersed in glycerine, some of which is absorbed. Excess moisture is then pressed out by rollers and the material is dried. The basic commercial product, a thin, transparent, flexible, non-fibrous sheet, is called plain transparent cellophane.

13. Sheets of plain cellophane may be processed with a moisture resistant film, usually comprising waxes, resins, nitro cellulose or other film-forming materials and plasticizers. Moistureproof cellophane is designed for wrapping articles which must be protected against gain or loss in moisture content. Demand for moistureproof cellophane exceeds that for the uncoated film, which it outsells at an approximate ratio of three to one. For purposes of this complaint, the term "cellophane" will be used to designate regenerated cellulose sheeting irrespective of type.

14. Caps and bands are films of regenerated cellulose, made by processes and from materials similar to those utilized in
429 the manufacture of cellophane, extruded in such a manner as to form tubular skins which, when placed over the openings of containers or tubing in the wet state, shrink upon drying to form either a primary or secondary closure.

15. The product, cellophane, and processes for its production were divulged prior to 1905. However, it was the work of J. E. Brandenberger, in France, commencing in or about 1908, which resulted in the design and construction of machines to manufacture cellophane in the endless sheet form of the modern product. The Comptoir acquired the Brandenberger processes and patents and subsequently organized La Cellophane to manufacture cellophane thereunder.

V. Trade and Commerce

16. For several years prior to 1923, La Cellophane supplied all the requirements of American purchasers of cellophane by exports from France. In that year, pursuant to an agreement by and between du Pont and Arena Trading Corporation, a Deleware corporation acting on behalf of and as the authorized agent of La Cellophane, du Pont acquired the cellophane markets for the United States. In or about 1924, DCC began manufacturing in its first plant at Buffalo, New York. Until its production was

sufficient to satisfy demand, du Pont sold cellophane shipped from France, thereby supplanting La Cellophane's exclusive agents for the United States. In or about 1928, du Pont acquired its caps and bands business by virtue of the purchase of Capes-Viscose, Inc., an American subsidiary of the Comptoir. Moistureproof cellophane was put into production in 1927 and rapidly assumed a position as the most important single product in the industry.

17. du Pont presently owns and operates six plants engaged in the manufacture of cellophane, and has sales offices at Chicago, Illinois; New York, New York; Philadelphia, Pennsyl-
430 vania; San Francisco, California and Boston, Massachusetts. The location of du Pont's manufacturing plants, the date when production was started in each, and the expansion which had occurred by 1944 are set forth in the table below:

Du Pont cellophane plants

Plant and location	Operation started	Rated annual producing capacity	
		Initial (pounds)	1944 (pounds)
Buffalo #1 (N. Y.)	April 1924	1,300,000	[1] 12,000,000
Old Hickory #1 (Tenn.)	October 1929	6,000,000	15,000,000
Old Hickory #2 (Tenn.)	August 1930	6,000,000	15,000,000
Spruance #1 (Richmond, Va.)	November 1930	6,600,000	15,000,000
Buffalo #2 (N. Y.)	February 1932	8,700,000	16,000,000
Spruance #2 (Richmond, Va.)	May 1937	12,200,000	19,000,000
Clinton (Iowa)	March 1941	14,000,000	18,000,000

[1] Rated capacity at Buffalo #1 when manufacture there was discontinued in 1942, for purposes of conversion to the production of rayon tire yarn.

18. Sylvania Industrial Corporation (hereinafter referred to as "Sylvania"), formerly a corporation organized and existing under the laws of the State of Virginia, has been the only other domestic manufacturer of cellophane. This company commenced production in or about June, 1930 and since that time has owned and operated a single plant at Fredericksburg, Virginia. During 1946, Sylvania was acquired by American Viscose Company, a corporation organized and existing under the laws of the State of Delaware and the largest producer of viscose rayon in the United States. Whenever the term "Sylvania" is hereinafter used with reference to events transpiring subsequent to the date of said acquisition it shall mean the Sylvania Division of the American Viscose Company.

431 19. In addition to du Pont and Sylvania, a small independent manufacturer, Celon Company, (hereinafter referred to as "Celon"), produces caps and bands at Madison, Wisconsin.

20. Cellophane and caps and bands have been and continue to be distributed principally by direct sales from the manufacturers to foodstuff packagers, tobacconists, textile merchants and other dealers in consumer goods. Indirect sales, which account for between thirty (30) and forty (40) per centum of gross sales, are made to small purchasers through jobbers, agents, fabricators and converters. During 1946 du Pont's sales of cellophane and caps and bands amounted to $46,224,349. du Pont sells and ships cellophane and caps and bands in interstate trade and commerce to users, distributors, and fabricators located in states other than the states in which the said commodities are produced.

VI. Offenses Charged

21. Beginning in or about the year 1923 and continuing thereafter up to and including the date of the filing of this complaint, the defendant has monopolized, has attempted to monopolize, and has combined and conspired to monopolize trade and commerce among the several states of the United States in cellophane and in caps and bands, all in violation of Section 2 of the Act of Congress of July 2f, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act. Defendant is continuing and threatens to and will continue said offenses, unless the relief hereinafter prayed for in this complaint is granted.

432 22. The defendant has wilfully and intentionally acquired and maintained a monopoly, presently existing, of the manufacture and sale of cellophane and caps and bands. As a result, the defendant now has, and has had for many years past, virtually absolute control of the markets in the United States for cellophane and caps and bands, and now possesses monopoly powers over said industry which, among others, include:

(a) The power to fix and maintain arbitrary and non-competitive prices and terms of sale for said products in the United States;

(b) The power to control the supply of said products available to domestic buyers;

(c) The power to exclude others who, but for du Pont's predominant position and power in the industry, would engage in the manufacture and sale of said products in the United States;

(d) The power to subvert the use of and to engross United States letters patent, trade marks, trade secrets and "know how";

(e) The power to restrain free and open competition at the distribution level of the industry by imposing unlawful terms and conditions upon domestic buyers of said products, who, lacking adequate, alternative sources of supply, were constrained to comply therewith.

The aforesaid market control and the monopoly powers appurtenant thereto, which have become self sustaining and self perpetuating, are more fully set forth and described hereinbelow.

433 23. In the assertion of its aforesaid monopoly power and to maintain, support and increase said power, the defendant has, throughout the period of time hereinabove alleged, arbitrarily determined prices and controlled supplies, has excluded potential competitors, has in its operations subverted the patent laws, has controlled the channels of distribution, and has performed other acts and practices, as are more fully hereinafter set forth and described.

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24. At all times during the period of time covering the violations of law herein alleged, the defendant has, within the United States, controlled the supplies of cellophane and caps and bands available to domestic purchasers. Excepting a single manufacturer possessing relatively small plant capacity in cellophane and caps and bands and one small producer of caps and bands only, du Pont manufactures the entire output of these products available for consumption within the United States. Aggregate production of cellophane by du Pont, from the commencement of domestic manufacture to the present time, averages in excess of seventy-eight (78) per centum of total supply. Throughout the same period, du Pont has owned and operated more than seventy (70) per centum of facilities existing within the United States devoted to the manufacture of cellophane. With the intent and effect of forestalling acesss to the industry by potential competitors, the defendant has constantly expanded such facilities in an effort to satisfy increasing demand, and, for the purpose of maintaining and improving its dominant position and power, has, within the three years immediately preceding filing of this complaint, appropriated large sums to expansion of its productive facilities for cellophane.

434 25. Prior to 1930, the defendant distributed and sold all cellophane manufactured within the United States. Commencing in the year 1934 and continuing on through 1946, du Pont has maintained gross annual sales ranging from seventy-four (74) to eighty (80) per centum of all cellophane sold by domestic producers. During the four calendar years immediately preceding filing of this complaint, du Pont has sold in excess of seventy-five (75) per centum of all cellophane available to domestic purchasers.

26. Production and sales of caps and bands throughout the period of domestic manufacture show consistently large increases; during 1946 the defendant sold approximately 1,490,000,000 units. Commencing in 1930 and continuing on through 1946, du Pont has

produced and sold more than seventy (70) per centum of aggregate domestic consumption; during the four calendar years immediately preceding filing of this complaint its production and sales did not fall below that percentage. The balance of this business has been handled principally by Celon, with a small share going to Sylvania. Plans are currently being carried out which will provide du Pont with a greatly increased productive capacity.

27. Since 1930 there has been virtually no imports of cellophane and caps and bands into the United States and such as have existed have been insufficient to influence the supply available to domestic markets. This lack of imports is a direct result of the combination and conspiracy, monopolization, and attempt to monopolize herein alleged and constitutes an important factor in the maintenance of du Pont's monopoly, as is hereinafter more fully described.

28. Throughout the period of domestic manufacture of cellophane and caps and bands within the United States, du Pont
435 has pursued a policy designed to bring about control, and having the effect of reducing to its control, the entire technology relating to the production of said products. The defendant has, by various means including pooling, cross licensing, and outright purchases, acquired control of virtually all patents and "know how," and rights thereunder or appurtenant thereto, relating to cellophane and caps and bands, and has restricted and prevented others from gaining access to said patents and "know how."

29. Price competition has been and is non-existent in this industry. Prices charged by Sylvania, the sole alternative source of cellophane, have followed rigidly the line of prices established by du Pont. Prices for cellophane and caps and bands are, and have been for many years, controlled and fixed by the defendant, arbitrarily, to yield predetermined profits, without regard for costs of production or other factors determinative in a competitive industry.

30. The defendant posseses the power to regulate the distribution of cellophane and caps and bands. This power arises from its predominance in the industry as producer and the resultant nonexistence of adequate, alternative sources of supply. Purchasers of these products have been dependent upon the defendant for their supplies and subjected to unlawful terms and conditions of sale imposed by du Pont. du Pont has implemented its power over distribution and aggravated the effects thereof by various acts and practices hereinafter set forth and described.

31. The defendant's power and control over the cellophane industry is buttressed by its extensive horizontal integration in the chemical industry and its dominant financial position. It is the largest corporation in the United States engaged primarily

436 in the chemical industry, and the second largest producer in the closely related viscose rayon yarn industry. The broad diversification of its products and markets has developed exceptional domestic and international affiliations, unattainable to Sylvania and Celon. Because any persons desiring to engage in the manufacture of cellophane or caps and bands would be placed at the mercy of a single, powerful corporation possessing the extensive control of technology and supply with the appurtenant powers herein alleged, and because of the great hazard necessarily involved in venturing into a business so completely dominated and monopolized by du Pont, such domination and monopolistic control has had and will continue to have the direct and immediate effect of suppressing and preventing the substantial competition which would otherwise arise in the production and sale in interstate commerce of such products.

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32. At all times during the period of time covering the violations of law herein alleged, the defendant has conducted its affairs pursuant to a policy designed to exclude domestic and foreign interests from the manufacture of cellophane and caps and bands within the United States, to bar free access to the domestic markets for said products, and to suppress the existing competition. The objectives of said policy have been accomplished by means of understandings, agreements, practices, and other acts and things, hereinafter more fully described.

3. Patents relating to cellophane and caps and bands have been utilized by the defendant to exclude or suppress competition by means of unlawful devices, tactics, and practices, including, among others, the following: (a) monopolization of United States letters patent and rights thereunder relating to cellophane and caps and bands with the intent and effect, not of operating under
437 many of the patents and rights so acquired, but to strengthen the defendant's technological control of the industry and to exclude others from the basic technology of the industry by the threat of a mass of patents; (b) acquisition of patents relating to cellophane and caps and bands, deemed by the defendant to be invalid or of doubtful validity, and the employment of several such patents to restrictively license others, from whom were exacted acknowledgments of the validity of said patents; (c) execution of exclusive cross licenses with other owners of patents, or rights thereunder, relating to cellophane or caps and bands, with the intent and effect of suppressing competition between the parties thereto and precluding others from engaging in the manufacture, use or sale of such products; (d) imposition of restrictive condi-

tions, designed to prevent free and open competition in the industry, in licenses of patents relating to cellophane or caps and bands, whereby du Pont's licensees were restrained by the means, among others, of tying clauses, and limitations on units of production or types of use; (e) settlement of patent disputes whereby du Pont and others, by agreement, have defined and allotted to du Pont, as an exclusive field of operation, the cellophane and caps and bands industry, and similarly have defined and allotted to said others certain related fields of business activity; (f) coercive use of patent and trade mark rights of doubtful validity relating to cellophane and caps and bands, including threats to institute infringement suits, with the intent and effect of maintaining du Pont's monopolization of the industry.

34. On or about April 26, 1933, du Pont entered into an understanding with Sylvania, in lieu of prosecuting a patent infringement suit against the latter, which accomplished, under color of various patent cross licensing arrangements, the establishment of an exclusive patent pool, dominating the manufacture and
438 sale of moistureproof cellophane. The purpose of said understanding and the acts done by the defendant in furtherance thereof were: (a) restriction upon the amount of moistureproof cellophane distributed and sold by Sylvania; (b) imposition of restrictions upon the distribution, use and sale of moistureproof cellophane by others; (c) preclusion of competition from others in the manufacture and sale of moistureproof cellophane. In effectuation of said understanding du Pont has executed certain contracts and done other acts and things with the intent and effect of suppressing competition from Sylvania and excluding all others from the industry.

35. In the exercise of its aforesaid power to fix and determine prices for cellophane and caps and bands, du Pont, early adopted and has successfully carried out an aggressive price policy designed to discourage entry into the industry by potential competitors and to suppress existing competition. At various times, the objectives of said policy were achieved by initiating substantial price reductions on cellophane for the express purpose of forestalling threatened competition. On other occasions, the defendant has warned others, who sought to engage in the manufacture or sale of cellophane, of imminent reductions in the price of its cellophane; or, pending expansion of its production capacity, has announced such reductions several months in advance of their effective dates, for the purpose of inhibiting potential competitors. From time to time, du Pont has had understandings with Sylvania and Celon regarding prices and discounts on cellophane and caps and bands, respectively. The aforesaid price policy and prac-

tices pursuant thereto have been directed primarily against domestic manufacturers of viscose rayon yarn and products similar to cellophane, former importers of cellophane, and foreign producers professing an interest in domestic production. The defendant, at all times, presented its control of cellophane and
439 caps and bands prices as an effective weapon to be used against all threats to its market control.

36. The defendant has pursued various devices and entered into understandings and agreements designed to anticipate and prevent the development of new competition and to suppress existing competitors, all with the purpose and effect of excluding business interests in the United States from engaging in the manufacture and sale of cellophane and caps and bands. In effectuation of that objective, du Pont has: (a) by agreements defined and allotted to itself, as an exclusive field of operation, the manufacture and sale of cellophane and caps and bands, and similarly has defined and allotted to others certain related fields of business activity; (b) has interjected into contracts, covenants by others not to engage in the manufacture of cellophane; (c) induced others to breach contracts with certain competitors; (d) allowed unreasonable quantity discounts to large scale buyers of cellophane and caps and bands, with the effect of channeling the entire requirements of said buyers to du Pont and away from other potential suppliers; (e) executed exclusive dealer agreements with the largest cellophane converters; and (f) exerted the prestige and power of du Pont's position in the chemical industry to dissuade others from engaging in the manufacture and sale of cellophane. The defendant has at all times maintained surveillance of the industry to obtain information concerning the policies and practices of its competitors and to discover incipient competition; and has expanded its facilities from time to time for the purpose of anticipating and discouraging new competition.

37. du Pont has adopted and employed numerous unfair sales practices, some of which are in themselves unlawful, including, among others, the following: (a) selecting and controlling
440 the number and type of buyers to engage in conversion or distribution of cellophane and caps and bands; (b) utilizing its position in the industry by arbitrarily and unreasonably refusing to sell to certain users of said products; (c) refusing certain purchasers of du Pont cellophane the use of its trademark and other privileges relating to the resale of that product; (d) fixing an arbitrary and discriminatory, discount schedule for sales of cellophane and caps and bands to users, converters, and distributors, in such manner that price differentials on orders of varying

quantities were not justified by actual savings in costs to the defendant; (e) establishing arbitrary classifications of buyers of cellophane, whereby discriminatory discounts and terms of sale were effectuated; (f) restraining and preventing price competition in the distribution of cellophane and caps and bands by fixing and maintaining prices at which purchasers from du Pont were to resell such products; and (g) defining geographical areas and restraining the activities of certain of its purchasers to resales only within said areas.

38. The defendant has prevented establishment within the United States of manufacturing facilities for cellophane and caps and bands by foreign interests. European producers of materials of regenerated cellulose, by reason of their technical knowledge and experience, constitute potential competition to du Pont's domination of domestic production. Potential competitors of this nature have been excluded from engaging, either directly or through association with domestic manufacturers, in the manufacture of cellophane or caps and bands in this country. Principally, du Pont has accomplished exclusion of these competitive factors in concord with the co-conspirators, named herein, by means of understandings and agreements, acts and things, hereinafter more fully set forth. Said concordance, in addition to inhibiting the investment of foreign capital in plants located within the United States, has discouraged expansion by domestic manufacturers into production of cellophane and caps and bands.

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441 39. du Pont has entered into unlawful understandings, having as their objective and result a world-wide cartel, with the principal foreign manufacturers of cellophane and caps and bands, who are named as co-conspirators herein, for the allocation of territories and the exchange of patent rights and technical knowledge. The purpose and effect of these understandings have been: (1) to eliminate and exclude the co-conspirators and their licensees from manufacturing, marketing and selling cellophane and caps and bands within the United States in competition with the defendant; and (2) to obtain for the defendant exclusive rights in the United States to all patents, inventions and technical knowledge developed by the co-conspirators and their licensees, which relate to cellophane and caps and bands, and to deny to potential American competitors access to said patents, inventions and technical knowledge. Said understandings between the defendant and co-conspirators have been carried out and effectuated, in large part, by various written contracts.

40. By the terms of the aforesaid written contracts, or agreements and addenda supplemental thereto, it was provided among other things: (a) that the United States, its territories and possessions, and certain other countries in North and Central America be allocated to the defendant, and the rest of the world, excluding South America and Japan which were shared by du Pont and the French interests, be allocated among the various co-conspirators; (b) that the co-conspirators refrain from manufacturing, marketing and selling cellophane or caps and bands in the geographical areas allocated to du Pont; (c) that the defendant refrain from manufacturing, marketing, or selling said products in the geographical areas allocated to the co-conspirators; (d) that the defendant and co-conspirators grant each other exclusive rights to make, use, and sell cellophane and caps or bands
442 in the geographical areas respectively allocated to each, but not beyond the boundaries thereof, under all their respective existing and future patent rights; (e) that the defendant and co-conspirators exchange complete technical knowledge with respect to cellophane and caps and bands; and (f) that the defendant and co-conspirators require their licensees to assume, observe and perform their respective obligations under these contracts.

41. At various times during the period of time covering the violations of law herein alleged, du Pont entered into written contracts of the nature described in the preceding paragraph with co-conspirators La Cellophane, BCL, CIL, Kalle, Viscose Francaise, and VDC. The defendant conducted its business in accordance with the understandings alleged in paragraph 39 and with strict observance of the terms of the aforesaid contracts until on or about October 17, 1940, at which time du Pont nominally disavowed the allocation of markets incorporated in said terms, but, in fact, du Pont continued, thereafter, to operate and is now operating in conformance with the illegal division of territories. On or about March 26, 1941, the defendant gave notice that, because of conditions growing out of the then current hostilities in Europe, it regarded its agreements with La Cellophane, Viscose Francaise, and Kalle as terminated.

42. In addition to the understanding and contractual arrangements between du Pont and CIL, alleged hereinabove, the defendant, by virtue of its stock interests in CIL, has exercised and is now exercising control over the manufacturing and sales policies and practices of CIL. In the exercise of such control du Pont has prevented CIL from importing cellophane into the United States for sale in competition with du Pont, and has excluded itself from exporting cellophane to Canada to be sold in competition with CIL.

443 43. The defendant has eliminated and prevented competition from foreign manufacturers of cellophane and caps and bands, other than the co-conspirators, by diverse means and methods. At various times, it has carried out a policy of making substantial price reductions on cellophane, has materially expanded its productive facilities therefore, and has asserted a strong patent position with respect thereto, all with the intent and effect of eliminating and preventing importations into the United States by foreign producers, other than the co-conspirators. du Pont has advised La Cellophane of its aforesaid policies with the intent and purpose that La Cellophane would inform European cellophane producers other than the co-conspirators, and La Cellophane has informed such producers of said policies. La Cellophane has performed other acts and things on behalf of du Pont, with the latter's knowledge and consent, for the purpose of restraining and preventing such producers from exporting cellophane to the United States. To support and maintain its monopoly, du Pont has sought the establishment and maintenance of high import duties on cellophane with the intent and effect of thus eliminating and preventing the importation of cellophane into the United States.

VII. Effects of the Violations of Law

44. The monopolization, attempt to monopolize, and combination and conspiracy to monopolize, hereinabove alleged, and the various acts, acquisitions, contracts, agreements, and understandings, which formed a part of and were used in effectuation thereof, have culminated in achievement and maintenance by the defendant of a presently existing monopoly in the manufacture and sale of cellophane and caps and bands. In the course of establishing and protecting this monopoly others have been excluded from free access to American markets for said products; imports
444 have been virtually eliminated and, reciprocally, exports have been drastically curtailed; new capital investment, both foreign and domestic, has been discouraged; and American buyers of said products have been deprived of recourse to adequate, alternative sources of supply. Market domination, in terms of control of supply and prices for cellophane and caps and bands, has induced competitors to subscribe to price leadership; buyers of said products are subjected to arbitrarily fixed and discriminatory prices; and the American public is deprived of the benefits inherent in a system of free enterprise.

VIII. Prayer

Wherefore, the plaintiff prays:

(1) That the aforesaid monopolization, attempt to monopolize, and combination and conspiracy to monopolize be adjudged and decreed to be unlawful, and that the contracts, agreements, understandings, acquisitions, acts, and practices alleged in this complaint be adjudged and decreed to be in violation of the Sherman Act.

(2) That the Court adjudge and decree that the defendant has monopolized, has attempted to monopolize, and has combined and conspired to monopolize the trade and commerce among the several states of the United States in cellophane and caps and bands, in violation of Section 2 of the Sherman Act.

(3) That the defendant and its officers, directors, agents, representatives, successors, assignees, and all persons and corporations acting or claiming to act on behalf of them be perpetually enjoined from monopolizing, attempting to monopolize, or combining and conspiring to monopolize trade and commerce among the several states of the United States with respect to cellophane and caps and bands, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act.

(4) That du Pont be required to take such action with regard to its properties and assets used in the manufacture and distribution of cellophane and caps and bands as may be necessary to terminate and dissipate the effects resulting from said monopolies and monopolization. And more particularly, that du Pont be required to divest itself of such plants and factories under such terms and conditions as may be necessary and appropriate to establish a competitive industry in cellophane and caps and bands.

(5) That the Court appoint such receivers and trustees as may be necessary or appropriate to meet the requirements of the preceding paragraph of this Prayer; that the Court order the said receivers and trustees to file in this Court for the Court's approval, within ninety (90) days after this cause shall be finally adjudicated and a decree entered, a plan or plans for the disposition of the above described properties, with notice to the Government and an opportunity to be heard thereon; that sales of said plants, properties and assets be made to a concern or concerns, having no relationship to the defendant, direct or indirect, and that such sales be made to separate concerns or interests having no relationship whatsoever with any existing cellophane or caps and bands manufacturer.

(6) That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper.

(7) That the plaintiff recover the costs of this suit.

446 (S) ROBERT A. NITSCHKE,
Special Assistant to the Attorney General.
(S) JAMES L. MINICUS,
Special Attorney.
(S) GEORGE W. WISE,
Special Attorney.

(S) TOM C. CLARK,
Attorney General.
(S) JOHN F. SONNETT,
Assistant Attorney General.
(S) GEORGE MORRIS FAY,
United States Attorney.

447 In the United States District Court for the District of Columbia

[Title omitted.]

Answer of E. I. du Pont de Nemours and Company

(Filed March 30, 1948)

The defendant, E. I. du Pont de Nemours & Company (hereinafter referred to as "du Pont") by its attorneys answers the Complaint herein as follows: (the succeeding paragraphs being numbered to correspond to the numbering of the Complaint):

1. Du Pont admits the Complaint is filed and this action is instituted under Section 4 of the Sherman Act. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

2. Du Pont admits that it has an office, transacts business, and is found within the District of Columbia.

3. Du Pont admits and avers that it is a corporation or-
ganized and existing under the laws of the State of
448 Delaware with offices and principal place of business at Wilmington, Delaware, and is named the defendant herein; that it is successor to Du Pont Cellophane Company, Inc. (sometimes referred to in the Complaint and in this Answer as DCCI), the latter having been dissolved in or about 1936, at which time its assets were transferred to and its contractual rights and obligations assumed by du Pont; that at all times DCCI was a wholly owned subsidiary of du Pont Securities Corporation which was a

wholly owned subsidiary of du Pont; that DCCI was the successor to an earlier Du Pont Cellophane Company, Inc. (sometimes referred to in the Complaint and in this Answer as DCC) through reincorporation of the latter under the laws of the State of Delaware in or about 1929; that DCC was incorporated under the laws of the State of Delaware in or about 1923, and, at all times prior to the aforesaid reincorporation in 1929, du Pont owned in excess of 50% of the voting stock of DCC; that DCC and DCCI respectively entered into contracts and did other acts and things; that by reason of its stock ownership in du Pont Securities Corporation and in DCC and the rights incident to such ownership, du Pont had the power to control the management and policies of DCC and DCCI, but that such power was exercised only to a limited degree, and that with respect to the great majority of matters, decisions were made independently by the management of DCC and DCCI respectively; that as used in subsequent paragraphs of the Complaint and of this Answer the term "du Pont" includes DCC and DCCI as well as du Pont. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

4. Du Pont admits that La Cellophane, Societe Anonyme
449 is referred to in the Complaint and in this Answer as La Cellophane; that La Cellophane is not made a defendant herein but is named as a co-conspirator; that La Cellophane is a corporation organized and existing under the laws of the Republic of France with offices and principal place of business at Paris, France. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

5. Du Pont admits that British Cellophane Limited is referred to in the Complaint and in this Answer as BCL; that BCL is a corporation organized and existing under the laws of the United Kingdom with offices and principal place of business at London, England; that BCL is not made a defendant herein but is named as a co-conspirator; that BCL was formed as a jointly owned subsidiary of La Cellophane and Courtaulds Limited and was such a subsidiary for some time thereafter and that BCL produces cellophane in England. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

6. Du Pont admits and avers that Canadian Industries Limited is referred to in the Complaint and in this Answer as CIL; that CIL is a corporation organized and existing under the laws of the Dominion of Canada with offices and principal place of business in Montreal, Canada; that it is not made a defendant herein but is named as a co-conspirator; that it is the largest manufac-

turer in Canada of plain cellophane and moistureproof cellophane as those products are defined in this Answer; that du Pont and Imperial Chemical Industries, Limited, own and for some time past have owned separate shareholdings totalling from
450 85% to 95% of the voting stock of CIL; and that by reason of such stock ownership and the rights incident thereto they have had the power jointly, by action in common, to control its management and policies, but that their individual and collective power has been exercised only to a limited degree, and with respect to the great majority of matters decisions have been made independently by the Canadian management of CIL. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

7. Du Pont admits that Kalle & Co., A. G. is referred to in the Complaint and in this Answer as Kalle; that prior to the advent of World War II it was a corporation organized and existing under the laws of the German Reich and then had offices and principal place of business at Wiesbaden-Biebrich, Germany; that it is not made a defendant herein but is named as a co-conspirator. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

8. Du Pont admits that Societe de La Viscose Francaise, Societe Anonyme is referred to in the Complaint and in this Answer as Viscose Francaise, that it is a corporation organized and existing under the laws of the Republic of France with offices and principal place of business at Paris, France; that it is not made a defendant herein but is named as a co-conspirator; that Viscose Francaise was associated with the Comptoir; that Viscose Francaise was successor in interest to the caps and bands business of Societe Francaise des Crins Artificiels; that the term Viscose Francaise is used in the Complaint and in this Answer to mean either Viscose Francaise or its predecessor Societe
451 Francaise des Crins Artificiels. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

9. Du Pont admits and avers that the Viscose Development Company, Limited, is referred to in the Complaint and in this Answer as VDC; that it is a corporation organized and existing under the laws of the United Kingdom with offices and principal place of business at Bromley, Kent, England; that it is not made a defendant herein but is named as co-conspirator and that VDC manufactures caps and bands in England. Except as to those facts specifically admitted, du Pont is without knowledge or in-

formation sufficient to form a belief as to the truth of the allegations of this paragraph.

10. Du Pont admits the allegations of this paragraph.

11. Du Pont admits and avers

that cellulose caps and bands are referred to in the Complaint and in this Answer as "caps and bands"; that caps and bands are used principally as secondary bottle closures, particularly for distillers' industries;

that many types of caps and bands, application, shipping solutions and apparatus and processes for the production thereof were discovered and invented by du Pont and are within the claims of United States patents owned by du Pont;

that plain cellophane, as manufactured by du Pont, is a thin, transparent, flexible, non-fibrous film of regenerated cellulose containing glycerol as a softener;

452 that plain cellophane is primarily used for wrapping products as to which the gain or loss of moisture is not important;

that certain methods, processes and equipment for the production of plain cellophane were within the claims of United States patents when production of plain cellophane in the United States commenced; that du Pont discovered and invented certain of the methods, processes and equipment now used in the commercial production of plain cellophane and that certain of the methods, processes and equipment for the production of plain cellophane are within the claims of United States patents some of which are owned by du Pont;

that moistureproof cellophane, as manufactured by du Pont is a thin, transparent, flexible non-fibrous film of regenerated cellulose containing a softener, which may be of several types one of which is glycerol, combined with a moistureproofing composition and characterized by a moistureproof quality equivalent to its ability to resist diffusion of water vapor therethrough at least seven times as effectively as plain cellophane, as defined above;

that moistureproof cellophane is primarily used for wrapping tobacco products, foodstuffs and other products in which control of the gain or loss of moisture is important; that during World War II moistureproof cellophane was used for numerous military purposes;

that the product moistureproof cellophane and the processes, compositions and apparatus for the manufacture of moistureproof cellophane were invented by du Pont and since production

453 of moistureproof cellophane commenced until the present have been and are within the claims of United States patents issued to du Pont;

that the terms "plain cellophane" and "moistureproof cellophane" are used in this Answer as defined in this paragraph; and that the term "cellophane" is used in this Answer as including plain cellophane and moistureproof cellophane as defined in this paragraph.

That the principal market for plain cellophane and moistureproof cellophane is as wrapping materials; that from the time domestic production commenced to the present, plain cellophane and moistureproof cellophane have been in direct competition with other materials employed by the packaging industry, particularly glassine, wax papers, greaseproof papers, cartons, foils, and more recently, new types of transparent films. Competition has been extremely keen and difficult due to the higher cost of cellophane, and the cellophane market has grown only as manufacturers and retailers substitute it at a higher cost for competitive materials previously used in particular packages. Paper, foil and cartons are made in a multiplicity of types, many of which equal or excel cellophane as to one or more of the desirable properties of a wrapping material or container, such as strength, moistureproofness, greaseproofness, printability, foldability, and attractive appearance. Flexible packaging materials competitive with cellophane dominate the wrapping field to such an extent that production of paper packaging materials alone in 1946 was approximately 1,000,000,000 pounds, whereas the entire domestic production of cellophane was only about 140,000,000 pounds. Cellophane
454 has been able to displace other packaging materials to some extent only by reason of intensive sales efforts, the superiority of cellophane for some wrapping purposes, and the price reductions, made as lower manufacturing costs warranted, which lessened the considerable price advantage of other wrapping materials as compared with the higher price of cellophane. Wax papers, greaseproof papers, glassine, and foil are especially competitive with cellophane in the packaging of food products, which represents much the largest portion of cellophane sales. As to many food products, cellophane is now used by some companies, but by far the majority of food packaging is still accomplished with use of other wrapping materials. With respect to such uses and others, a substantial number of users use cellophane and other wrapping materials concurrently and interchangeably for identical uses or shift from one to the other for identical uses as price, economic conditions and other factors dictate. The price advantage and characteristics of such competitive materials have completely prevented the sale of cellophane for packaging of some food products.

Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

12. Du Pont admits and avers that plain cellophane is manufactured by extruding viscose through a long, narrow slot into a chemical bath where it coagulates in the form of a thin sheet; that this sheet is then run through a succession of purifying baths and while still wet is immersed in a water solution of glycerol, some of which is absorbed; that excess moisture is then removed from the surface of the film and the material is dried to a predetermined moisture content; that the commercial product called plain transparent cellophane is as defined in paragraph 11 of this Answer. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

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13. Du Pont admits and avers that moistureproof cellophane is designed for wrapping articles as to which protection against gain or loss in moisture content is important or desirable; that thin, transparent films of regenerated cellulose, containing a softener which may be of several types, one of which is glycerol, may be provided with a moistureproofing coating composition which may comprise waxes, resin, nitro-cellulose or other film forming materials and plasticizers; that demand for moisture proof cellophane as defined in paragraph 11 of this Answer exceeds that for plain cellophane as there defined, and that moistureproof cellophane outsells plain cellophane at an approximate ratio of seven to one; and that in the Complaint the term "cellophane" is used to designate plain cellophane and moistureproof cellophane as those terms are defined in the Complaint irrespective of type. Except as to those facts specifically admitted, du Pont denies the allegation of this paragraph.

14. Du Pont admits that caps and bands are made of regenerated cellulose; and avers that it has not produced or sold caps since May 31, 1947. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

15. Du Pont admits and avers that a thin, transparent, nonfibrous film of regenerated cellulose was divulged prior to 1905; that the work of J. E. Brandenberger in France, commencing in or about 1908, particularly with respect to the use of glycerine as a softener, resulted in the design and construction of machines to manufacture plain cellophane in the endless sheet form on a commercial basis about 1912; and that Comptoir acquired the Brandenberger processes and patents and subsequently organized La Cellophane to manufacture plain cellophane thereunder. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

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16. Du Pont admits that La Cellophane exported plain cellophane to the United States; that in 1923 du Pont entered into a contract with Arena Trading Corporation, a Delaware corporation, acting on behalf of and as the authorized agent of La Cellophane, the original of which contract will be produced at trial and of which the plaintiff has a copy in its possession; that DCC began manufacturing plain cellophane in its first plant in Buffalo, New York, in 1924; that du Pont in 1923 and for a short period thereafter purchased plain cellophane for sale in the United States from La Cellophane; that in 1928 du Pont purchased all the assets of Capes-Viscose, Inc., a New Jersey corporation manufacturing plain cellophane caps and bands which was a subsidiary of the Comptoir; and that moistureproof cellophane was put into production in 1927 and sometime thereafter became the most important type of cellophane in the United States. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

17. Du Pont admits the allegations of this paragraph, except it denies the footnote appearing at the end thereof, and avers that manufacture of Buffalo #1 was discontinued in 1942 as a result of plaintiff's restrictions on the use of cellophane, that
457 thereafter the War Production Board, an agency of the plaintiff, requested that the plant be converted to the production of rayon tire yarn; and that such conversion was commenced in 1943 and completed in 1944.

18. Du Pont admits and avers that Sylvania Industrial Corporation was formerly a corporation organized and existing under the laws of the State of Virginia; that it has been the only other domestic manufacturer of plain cellophane; that Sylvania commenced production in or about 1930 and owned and operated a plant at Fredericksburg, Virginia, and steadily expanded its production and sale of cellophane; that during 1946 Sylvania was acquired by American Viscose Company, a corporation organized and existing under the laws of the State of Delaware; that American Viscose Company is the largest producer of viscose and of viscose rayon in the United States; that the term Sylvania is used in the Complaint and in this Answer with reference to events since the date of said acquisition as meaning the Sylvania Division of the American Viscose Company and prior thereto to mean Sylvania Industrial Corporation. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

19. Du Pont admits and avers that Sylvania produces bands; that Celon Company produces caps and bands at Madison, Wisconsin; that du Pont produces bands; and that Sylvania and Celon

are both manufacturers wholly independent of du Pont, and of each other. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

20. Du Pont admits that during 1946 du Pont's sales of cellophane and caps and bands amounted to $46,224,349
458 and that du Pont sells and ships cellophane and bands in interstate trade and commerce to purchasers located in states other than the states in which the said commodities are produced. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

21, 22 and 23. Du Pont denies each and every allegation of each of these paragraphs.

24. Du Pont admits and avers that in the United States one other manufacturer produces large quantities of plain cellophane and moistureproof cellophane and also bands; that still another manufacturer produces caps and bands; that du Pont has not since May 31, 1947, produced or sold caps and that du Pont manufactures and sells substantial amounts of bands, plain cellophane and moistureproof cellophane; that du Pont has from time to time expanded its facilities for the manufacture of plain cellophane and moistureproof cellophane; and that within the three years immediately preceding the filing of the Complaint it has set aside funds to increase its facilities for the production of cellophane. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

25. Du Pont admits and avers that prior to 1930 it distributed and sold all plain cellophane and moistureproof cellophane manufactured within the United States; that from 1934 through 1946 du Pont's gross annual sales of moistureproof cellophane were between 75.8% and 82% of total dollar sales of moistureproof cellophane sold by domestic producers in each year; during the calendar years 1943–1946 inclusive, it has sold in excess of 77.2%
459 of all moistureproof cellophane sold in the United States. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

26. Du Pont admits and avers that production and sales of caps and bands by du Pont and by its competitiors have increased since 1928; that during 1946 du Pont sold approximately 1,490,000,000 units; that Celon produces and sells caps and bands; that Sylvania produces and sells bands; and that du Pont has not engaged in the production or sale of caps since May 31, 1947. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

27. Du Pont admits that imports of cellophane and caps and bands have been small since 1930; and avers that the lack of imports since 1930 resulted from, among other things, the superior quality, low prices and amount of cellophane produced in the United States, a decision of the United States Customs Court in 1929 which classified transparent cellulose sheeting as a cellulose compound, the Tariff Act of 1930 which fixed the duty on cellulose compounds at 45% ad valorem, the existence of United States patents relating to cellophane and caps and bands and of the impact of hostilities upon world economy and transportation. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

28. Du Pont denies each and every allegation of this paragraph.

29. Du Pont admits and avers that du Pont acting independently of Sylvania made price reductions on plain cellophane and
460 moistureproof cellophane; that du Pont has frequently reduced prices as increased volume enabled lower unit costs; that from 1924 to the present it has lowered its prices for plain cellophane and moistureproof cellophane many times, with a total reduction in price per pound of plain cellophane from $2.65 in 1924 to $0.42 at the time the Complaint was filed; and of moistureproof cellophane from $1.60 in 1927 to $0.44 at the time the Complaint was filed; and that the prices charged by Sylvania for plain cellophane and moistureproof cellophane are not the same as the prices charged by du Pont for such products. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

30. Du Pont denies each and every allegation of this paragraph; and du Pont avers that it has neither produced nor sold caps since May 31, 1947.

31. Du Pont admits and avers that it is the largest corporation located in the United States primarily engaged in the chemical industry and is the second largest producer of viscose rayon yarn in the United States, and that the largest producer in the viscose rayon yarn industry in the United States is the American Viscose Co., which in 1946 acquired Sylvania Industrial Corporation. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

32. Du Pont denies each and every allegation of this paragraph.

33. Du Pont admits and avers that it has acquired patents relating to plain cellophane, moistureproof cellophane and
461 caps and bands; that it has granted licenses to others under United States and foreign patents owned by it which relate to such products; that it has been granted licenses under patents

owned by others relating to such products; and that it has settled patent disputes. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

34. Du Pont admits and avers that in connection with the settlement of a patent infringement suit brought by du Pont against Sylvania, on or about April 26, 1933, du Pont entered into a patent licensing contract with Sylvania, the original of which will be produced at trial and a copy of which is in the possession of the plaintiff and that said contract has been superseded by subsequent contracts between du Pont and Sylvania. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

35. Du Pont admits and avers that it has repeatedly reduced its prices for plain cellophane and moistureproof cellophane since it commenced production of each type; and that it has made repeated reductions in its prices for bands. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

36. Du Pont admits and avers that it has entered into certain contracts with others with relation to plain cellophane, and moistureproof cellophane, and caps and bands; that prior to January 1, 1947, it allowed discounts for quantity purchases of cellophane; that prior to May 1947 it allowed quantity discounts for caps and now allows quantity discounts for bands; that prior to January 1, 1947, it had exclusive dealer agreements with certain cellophane converters; and that it has expanded its facilities for the production of plain cellophane and of moistureproof cellophane since manufacture of each such product began. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

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37. Du Pont admits and avers that it has selected the types of buyers to engage in conversion and distribution of plain cellophane and moistureproof cellophane and caps and bands manufactured by it; that it has discount schedules for the sale of cellophane and bands; that no quantity discounts for cellophane have been allowed since January 1, 1947; that it has classified certain purchasers in accordance with their functions; that it has assigned geographical areas to certain of its distributors; that prior to January 1, 1947, in certain cases it refused purchasers of du Pont cellophane the use of its standard label which was intended to identify the material as of du Pont origin, where du Pont could not be certain that the products of such purchasers would in fact be of du Pont origin. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

38. Du Pont admits and avers that it entered into certain contracts with the corporations named in paragraphs 4 through 9 of the Complaint. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

39 and 40. Du Pont denies each and every allegation of each of these paragraphs.

41. Du Pont admits and avers that it entered into written contracts with La Cellophane, BCL, CIL, Kalle,
463 Viscose Francaise, and VDC; that on or about October 17, 1940, it sent a letter to the other party to each such contract; that a copy of each such letter will be produced at trial and is in the possession of plaintiff; that on or about March 26, 1941, du Pont gave notice that because of conditions growing out of the then current hostilities in Europe it regarded its agreements with La Cellophane, Viscose Francaise and Kalle as terminated; that no agreements between du Pont and La Cellophane, Viscose Francaise or Kalle have been in effect since on or about March 26, 1941; and that no agreement between du Pont and VDC has been in effect since June 5, 1947. Except for those facts specifically admitted, du Pont denies the allegations of this paragraph.

42. Du Pont admits and avers that it and Imperial Chemical Industries, Limited, own and for some time past have owned separate shareholdings totalling from 85% to 95% of the voting stock of CIL; and that by reason of such stock ownership and the rights incident thereto they have had the power jointly, by action in common, to control its management and policies, but that their individual and collective power has been exercised only to a limited degree, and with respect to the great majority of matters decisions have been made independently by the Canadian management of CIL. Except as to those facts specifically admitted, du Pont denies the allegations of this paragraph.

43. Du Pont admits and avers that it has made substantial reductions in its prices for plain cellophane and for moistureproof cellophane; that it has materially expanded its productive facilities therefor; that it has on occasion asserted certain of its United States patents which relate to cellophane; that it filed with
464 an agency of plaintiff a manufacturer's protest against the tariff classification of transparent cellulose sheeting as a gelatin compound rather than as a cellulose compound, and that thereafter the United States Customs Court changed the classification of such sheeting to cellulose compound; and that the import duties on cellophane were established by the Congress and by authorized administrative agencies established by the Congress. Except as to those facts specifically admitted du Pont denies the allegations of this paragraph.

44. Du Pont denies each and every allegation of this paragraph.

Wherefore, du Pont denies that the plaintiff is entitled to the relief prayed for in the Complaint or any part thereof, or to any other relief against du Pont, and prays for judgment dismissing the Complaint herein with the cost and disbursements of this action.

COVINGTON; BURLING, RUBLEE, ACHESON & SHORB,
By (S) JOHN LORD O'BRIAN, *(a member of the firm)*,
Attorneys for E. I. du Pont de Nemours and Company;
Office and Post Office Address: 701 Union Trust Building, Washington 5, D. C.

Of Counsel:
JOHN LORD O'BRIAN.
GERHARD A. GESELL.
JAMES H. MCGLOTHLIN.

MARCH 30, 1948.

465 — Acceptance of service [omitted in printing].

466 In United States District Court for the District of Columbia

[Title omitted.]

Pretrial Conference Order No. 1

Filed March 24, 1949

STATEMENT OF NATURE OF CASE

ACTION FOR AN INJUNCTION UNDER ANTI-TRUST LAWS

Counsel for government will furnish to counsel for defendants a list of documents which the government intends to produce at the trial. The list is to be furnished not later than May 30th. Defendants' counsel will then indicate to government's counsel which of such documents they will then stipulate to admit at the trial subject to objection as to relevancy and competency.

This information is to be furnished not later than June 15, 1949.

The parties will also stipulate that copies of such documents may be used in lieu of the originals.

Plaintiff states that they will not challenge the validity of defendants' patents in their case in chief but reserve the right to do so in rebuttal if defense should rely on patents.

The Court directs the plaintiff to furnish to defense counsel a list of defendants' patents the validity of which plaintiff chal-

lenges, with a list of the prior art relied on in respect to each patent. This statement is to be furnished not later than July 31, 1949.

The foregoing direction applies also to trademarks.

At the same time plaintiff will furnish to defense counsel a list of patent disputes referred to in paragraph 33 (e) of the complaint.

Plaintiff is to furnish defense counsel a list of persons and contracts covered by paragraph 36 (c) of the complaint.

In respect to paragraph 29 the government claims that defendant fixed prices of cellophane charged by others.

In reference to paragraph 10 the government does not claim that defendant monopolized sausage casings made from cellophane.

Plaintiff is directed to furnish defendants' counsel, not later than May 31st, the names of competitors and potential competitors who were excluded by the defendant from the field of manufacturing cellophane.

467 Defendant is granted five days to file an amendment to paragraph 41 of the answer.

Plaintiff is granted leave to amend the complaint by correcting the name of the defendant wherever it appears. The present answer to stand as an answer to the amended complaint.

The case is not to be called for trial before October 1st, and is to be continued if another Anti-Trust case against the same defendant goes to trial in October entitled United States vs. Imperial Chemical Industries.

Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

(S) ALEXANDER HOLTZOFF,
Pretrial Justice.

Dated March 22, 1949.

Remarks of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

James L. Minicus,
(S) JAMES L. MINICUS,
Plaintiff.

Gerhard A. Gesell,
(S) GERHARD A. GESELL,
Defendant.

468 In United States District Court for the District of Columbia

[Title omitted.]

Amendment to Answer

Filed March 29, 1949

Pursuant to the pre-trial order entered herein on March 24, 1949, defendant amends paragraph 41 of its answer filed herein on March 30, 1948, by adding the following to the next to the last sentence thereof:

"and that no agreement between du Pont and BCL has been in effect since August 1, 1948."

(S) JOHN LORD O'BRIAN,
(S) GERHARD A. GESELL,
(S) WM. M. AIKEN,
Attorneys for Defendant.

Acceptance of service [omitted in printing].

469 In United States District Court for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order granting defendant's motion for change of venue, etc.

(Filed April 28, 1949)

Defendant's Motion for Change of Venue having come on for hearing on March 30, 1949, and the Court having decided by its written opinion filed herein on April 1, 1949, that said motion should be granted.

It is hereby ordered this 28th day of April, 1949, that this case be, and it is hereby transferred to the United States District Court for the District of Delaware and that the Clerk of this Court be, and he is hereby directed to transmit to the Clerk of the United States District Court for the District of Delaware, the entire file of papers in this cause, including the orders dated October 18, 1948 and February 10, 1949, sustaining plaintiff's objections to defendant's first and second sets of interrogatories and including the pre-trial Proceedings and Order of March 22 and 23, 1949, together

with all documents in this cause, a certified transcript of
470 the records of all orders in the cause, and a certificate, under the seal of this Court, that the papers sent are all which are on file in this Court belonging to the cause.

(S) ALEXANDER HOLTZOFF,
Judge.

Proof of service [omitted in printing].

471 In United States District Court for the District of Delaware

Civil Action No. 1216

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DU PONT DE NEMOURS AND COMPANY, INC., DEFENDANT

William Marvel, U. S. Attorney, of Wilmington, Del., James L. Minicus and Miss Mollie Strum, Special Attorneys, of Washington, D. C., for plaintiff.

Gerhard A. Gesell and William M. Aiken (of Covington, Burling, Rublee, O'Brian & Shorb), of Washington, D. C. and Francis J. Zugehoer, also of Washington, D. C., for defendant.

472 *Memorandum opinion*

(Filed September 29, 1949)

Plaintiff has filed a motion for an order modifying a Pre-trial Conference Order entered by a Pre-trial Justice in the District Court of the United States for the District of Columbia on March 22, 1949. In his order he provided in paragraph 5 that: "Plaintiff states that they [sic] will not challenge the validity of defendants' [sic] patents in their [sic] case in chief but reserve the right to do so in rebuttal if defense should rely on patents." That *seems* clear. But, in the following paragraph 6 it is stated: "The Court directs the plaintiff to furnish to defense counsel a list of defendants' [sic] patents the validity of which plaintiff challenges, with a list of the prior art relied on in respect to each patent. This statement is to be furnished not later than July 31, 1949."

On plaintiff's motion for clarification of the forwarding Court's Pre-trial Conference Order I declined, on May 24, to rule upon paragraph 6 and suggested plaintiff utilize pre-trial techniques of discovery in an effort to comply with the forwarding Court's

order. Plaintiff has made a bona fide effort to follow my directive and it now reports its failure to accomplish the task
473 imposed upon it by the Pre-trial Conference Order. It is obvious paragraphs 5 and 6 of that order are wholly inconsistent; and I do not think I am bound by the former ruling of the busy forwarding Court, even if it be assumed that it made any ruling.

The situation here has no complexity. Plaintiff has made a reasonable effort to comply with paragraph 6 even in the face of paragraph 5. It should not be required to talk out of both sides of its mouth at the same time. I have concluded that paragraph 6 will not be stricken, but at the same time plaintiff will not be required to make further compliance with that paragraph until further order of this court. The occasion may arise when paragraph 6 may have to be reconsidered. However, in the interim, plaintiff may proceed on the assumption that paragraph 5 is the present operative mandate and, if plaintiff ever has occasion to act under it defendant will have the orthodox rights of sur rebuttal.

(S) Paul Leahy,
Chief Judge.

Dated September 29, 1949.

474 In United States District Court

[Title omitted.]

Supplemental Pre-trial order

(Filed October 11, 1949)

A pre-trial conference having been had on October 11, 1949 for the purpose of considering ways and means of expediting the trial and facilitating the orderly presentation of proof, it is upon the consent of the parties:

Ordered:

1. This case shall be called for trial at 11:00 A. M. on February 15, 1950. On that date plaintiff shall proceed to offer in evidence all documents upon which it relies for its case in chief, subject to the other provisions of this Order. Plaintiff's documents shall be arranged in the order of its proof and theory of its case and shall be identified by exhibit numbers. All documents offered shall be subject to objections by defendant, as noted later in the provisions of this Order. There shall be no argument concerning, or explanation of, plaintiff's documents at the time of this offer.

2. At the conclusion of the presentation of plaintiff's documents,

as provided in paragraph 1 above, the trial of this case shall be adjourned to the October Term, 1950.

475 3. On May 15, 1950, defendant will submit to plaintiff all documents it intends to introduce into evidence, subject to the other provisions of this Order, arranged in accordance with defendant's order of its proof and theory of its case and shall be identified by exhibit numbers. On this same date, defendant will submit to plaintiff in writing a statement of its objections to the exhibits offered by plaintiff on February 15, 1950, it being understood that these objections will be subject to prior admissions by defendant of authenticity and genuineness as now provided to be made on October 27, 1949, pursuant to earlier orders in this case.

4. On the date that trial of this case re-opens in the October Term, 1950, plaintiff will submit to defendant a written statement of its objections to defendant's documents submitted on May 15, as provided above.

5. On this same day, plaintiff will furnish defendant with copies of the documents which it intends to offer in rebuttal to defendant's documentary case and defendant shall, at a time then to be fixed by the Court, advise plaintiff of its objections, if any, to said rebuttal documents.

6. It is not intended to preclude either party from offering any further documentary evidence should the materiality or relevance of such documents be disclosed by the testimony of a witness called by an opposing party or should the document not be in the possession of the party desiring to offer it at the time of the preparation of the lists mentioned above, or should the documents be omitted from such lists by inadvertence. Therefore, without attempting to enumerate all proper grounds for offering such additional documentary evidence, such evidence may be offered and admitted upon reasonable notice and upon a showing satisfactory to the Court that such offer is not inconsistent with the bona fide execution of this stipulation.

476 This stipulation shall not be taken to preclude either party from examining or cross-examining a witness upon any document or documents subject to ruling of the Court.

7. On the re-opening of the trial in the October Term, 1950, plaintiff will have opportunity for full discussion with the Court of the documents offered into evidence on February 15, 1950, and will thereafter present its oral evidence. This is to be followed in regular course by presentation of defendant's documents and defendant's oral testimony. In connection with the submission of any documentary evidence, both parties shall be afforded the opportunity to discuss orally with the Court the contents of such documents, indicating the portion relied upon and presenting

views as to the significance and interpretation of the documentary proof thus adduced.

8. Plaintiff will furnish defendant with a list of its witnesses 14 days prior to the re-opening of the trial in the October Term, 1950, and defendant will, 3 days prior to said date, furnish plaintiff with a list of its witnesses.

9. Neither party shall object to the introduction into evidence of any contract, agreement, letter, memorandum or other document submitted to either party in accordance with the provisions of paragraphs 1 to 5 inclusive hereof on the ground that a photostatic copy has been offered instead of such document.

10. Neither party shall object to the introduction into evidence of any agreement, to which defendant is a party, obtained or produced from or available in the files of the defendant on the ground that it has not been shown that the individuals signing such agreement had authority so to do.

11. Neither party shall object to the introduction into evidence of any signed letter or other signed communication
477 obtained or produced from, or available in the files of the defendant, which shows on its face that it was signed or dictated by a person who was then an officer, authorized agent, or employee of the defendant, on the ground that it has been shown that such letter or other signed communication was signed by the person whose signature appears thereon and that it has not been shown that such letter or other communication was received by the person to whom it is addressed.

12. Following the trial, in the event of a judgment in favor of the plaintiff, either party, for good cause shown, shall be given an opportunity to present evidence bearing on the appropriate form of relief after plaintiff has submitted its proposed decree.

13. Neither party shall object to the introduction into evidence of any report, publication or other document purportedly issued by any branch, department or agency of the United States Government on the ground that such report, publication or other document has not been certified.

14. Neither party shall object to the introduction into evidence of any schedule or other compilation on the ground that the source material of such schedule or other compilation is not available in Court, provided that the identity and location of such source material is clearly indicated on such schedule or other compilation, that such source material is made readily available to the parties, and that a copy of such schedule or other compilation has been furnished the other party not later than thirty days in advance of its being offered in evidence.

15. Neither party shall object to the introduction into evidence any copy of a United States patent or foreign patent

478 obtained from the files of the United States Patent Office on the ground that the original has not been offered.

16. Neither party shall object to the introduction into evidence of quotations of any foreign patent laws taken from a plainly identified publication on the ground that such publication has not been certified or authenticated.

(S) PAUL LEAHY,
District Judge.

Dated October 11, 1949.

Approved:

(S) JAMES L. MINICUS,
(S) JULIUS C. RENNINGER,
Attorneys for Plaintiff.
(S) GERHARD A. GESELL,
(S) JAMES H. McGLOTHLIN,
(S) WM. M. AIKEN,
Attorneys for Defendant.

479 In United States District Court

[Title omitted.]

Stipulation as to patents and research documents

(Filed June 16, 1950)

The parties stipulate:

1. Subject to all other provisions of the pre-trial order of October 11, 1949, the time within which defendant will submit to plaintiff all documents it intends to introduce into evidence relating to patents, patent policy, patent interferences, the acquisition or disposition of patent rights, patent litigation, research, inventions and negotiations with others relating to research and patent rights, is extended to June 22, 1950.

2. On June 22, 1950 defendant will furnish plaintiff with one complete set of its United States patents relating to the products described in paragraph 11 of the Answer arranged in the order of their United States patent numbers. Defendant will also furnish a complete set of said patents arranged in the same order to the Court for use during the trial. Either party may offer any patent in evidence at the trial and any patent so offered shall be given an exhibit number when offered.

3. On June 22, 1950 defendant will furnish to plaintiff
480 one copy of documents relating to certain research programs of the defendant. Plaintiff agrees not to disclose the contents of said documents to any persons except attorneys and other employees of the plaintiff engaged in preparation for the trial of this suit. Said documents shall not now be given exhibit

numbers but may be offered in evidence by either party at the trial and/or used in connection with the testimony of witnesses subject, however, to such objections as either party may make at the time except the objection that a photostatic copy is offered instead of the document.

Signed this 15th day of June 1950.

(S) JAMES L. MINICUS,
Attorney for Plaintiff.

(S) WM. M. AIKEN,
Attorney for Defendant.

Approved June 16, 1950.
(S) PAUL LEAHY,
Judge.

481 In United States District Court

[Title omitted.]

(Filed October 11, 1950)

Supplemental Pre-trial Order Number Two

A pre-trial conference having been had on October 6, 1950, for the purpose of considering ways and means of expediting the trial and facilitating the orderly presentation of proof, it is upon the consent of the parties:

Ordered:

1. The trial of this case shall reopen on January 17, 1951 and shall continue on January 18, 19, 24, 25, 26, 31, February 1, 2, 7, 8 and 9. The trial will then continue on subsequent dates as shall be determined by direction of the Court at a later date.

2. Prior to the introduction of any evidence for the defense, defendant will make a written offer of proof of the alleged competitive situation between cellophane and other materials. This offer of proof may be made simultaneously with a motion by defendant to dismiss at the close of the plaintiff's case in chief.

3. Prior to the introduction of any evidence by the defendant, plaintiff shall have an opportunity to argue its objections to defendant's documentary evidence originating subsequent to the filing of the Complaint on December 13, 1947.

In order to provide time for conferences between counsel for the reduction of objections to evidence, plaintiff will submit
482 to defendant on November 15, 1950, in writing a statement of its objections to the documents submitted by defendant to the plaintiff on June 15 and June 22, 1950.

5. Also on November 15, plaintiff will serve on defendant all documents obtained by the plaintiff subsequent to February 15,

1950, and which it intends to introduce into evidence. On the same date, plaintiff will file in the Court a copy of the documents served on defendant, and defendant will stipulate that such documents shall be deemed offered in evidence to the same extent as the plaintiff's documents offered February 15, 1950. This provision does not modify provisions of Paragraph 6 and Paragraph 14 of the Supplemental Pre-Trail Order dated October 11, 1949.

6. On December 15, defendant will submit to plaintiff in writing a statement of its objections to the documents served on it on November 15, 1950.

7. On January 2, each party shall submit to the other any doenments it intends to introduce in evidence which have not been submitted to the other party prior to that time. Objections to documents served on January 2, 1951 shall be made in writing on January 17, 1951. This does not modify provisions of Paragraph 6 and Paragraph 14 of the Supplemental Pre-Trial Order dated October 11, 1949.

8. Either party may submit a trial brief to the Court prior to or at the opening of its case, provided that such trial brief is simultaneously served on the other party. Any trial brief submitted shall be in short outline form.

9. During discussion of the Motion to Strike filed by defendant, plaintiff indicated that it intended to withdraw certain documents heretofore offered as exhibits. On or before October 17, plaintiff will indicate to defendant the documents it intends to withdraw from the documentary evidence already offered.

10. On October 24, the parties will meet with the Court to discuss further the motion in the light of the with-
483 drawals intended by the plaintiff. It is not intended that formal argument or ruling on the motion will be made at that time.

11. Plaintiff's time to answer defendant's Motion to Strike is extended to October 30.

Paul Leahy,
(S) PAUL LEAHY,
District Judge.

Dated October 11, 1950.

Approved:

(S) JAMES L. MINIGUS,
(S) JULIUS C. RENNINGER,
(S) PHILIP L. ROACHE, Jr.,
Attorneys for Plaintiff.

(S) COVINGTON, BURLING, RUBLEE, O'BRIAN & SHORB,
Attorneys for Defendant.

(S) By JAMES H. McGLOTHLIN.

485 In the United States District Court for the District of Delaware

Civil Action No. 1216.

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DU PONT DE NEMOURS AND COMPANY, DEFENDANT

William Marvel, U. S. Attorney, of Wilmington, Del., James L. Minieus and Julius C. Renninger, and William Amory Underhill and Marcus B. Hollabaugh, Special Assistants to the Attorney General, all of Washington, D. C., for plaintiff.

Hugh M. Morris and Alexander L. Nichols (of Morris, Steel, Nichols & Arsht), of Wilmington, Del., and Gerhard A. Gesell and William M. Aiken (of Covington, Burling, Rublee, O'Brian & Shorb), of Washington, D. C., for defendant.

486 *Opinion*

(Filed November 29, 1950)

LEAHY, Chief Judge.

The incident of getting an antitrust case to trial has recently been narrated. The problem ["Prolonged proceedings and a massive record are almost inevitable if an antitrust controversy is carried to court: for the rules of law that have been developed, with respect to both the offense and the proof which may be adduced, generally permit the entire history of a major company or industry to be placed in issue."] has been explored and examined as to procedures that have and have not been utilized in the courts, by McAllister[1] in a recent essay which contains excellent
487 notes on the pattern of procedure which is currently emerging.[2]

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[1] Breck P. McAllister, "The Big Case: Procedural Problems in Antitrust Litigation", 64 HARV. L. REV. 27.

[2] The Judicial Conference of the United States in November 1949 (Report of the Proceedings pp. 26, 27) appointed a committee of Federal judges, of which Circuit Judge E. Barrett Prettyman is chairman, to examine "the present procedure governing controversies arising under the antitrust laws and the various statutes establishing regulatory agencies, with a view to advancing their effective, expeditious, and economic disposition."

The Committee is at work on the matter, has filed a Progress Report, and plans to complete its Report before the next regular annual Conference. At the present writing the Committee* is considering (1) means whereby the proceedings of regulatory agencies may be shaped both to satisfy the needs of the parties and to facilitate the reviewing function of the courts; (2) means whereby at *nisi prius* particular evidence may be explicitly related to defined issues and all of the evidence on a particular issue presented together; (3) means whereby (a) the materials in the record are confined to the issues under review in preparation of the record after points for argument have been exchanged between the parties and by any other means devised for delimiting such, and (b) such materials are marshalled in a form most helpful for their consideration; (4) and all other modes by which the general ends herein indicated may be achieved.

*"Other members of the committee: Judges Stone, Magruder, Hand (A. N.), Lindley, Chesnut, Kloeb, Rifkind (resigned), Yankwich, and Leahy."

At a pretrial conference, I suggested that counsel in the
488 case at bar give consideration to procedures to be adopted with a view to limiting the issues and shortening the trial. Pursuant to pretrial order, the Antitrust Division has filed with the Clerk copies of documents on which it intends to rely, arranged and marked as exhibits in accordance with its proposed order of proof. These documents consist of 32 volumes containing approximately 2,500 exhibits, totaling approximately 5,500 pages. Admittedly, the Antitrust Division is continuing its investigations and additional documentary proofs may be offered, if not in its case in chief, then presumably on rebuttal. Defendant has now moved for an order striking all the documentary exhibits offered by the government or, in the alternative, directing the government to file "a list of the offered exhibits upon which plaintiff primarily relies, such list not to exceed 300 exhibits, and striking all offered exhibits not contained in the list."

489 It is difficult to apply a standard procedural technique of selectivity when a mass of documentary evidence is offered in a case of this type. Before any ruling is made, the background of each case must be considered. The action in the instant case is laid entirely under the monopoly section (§ 2) of the Sherman Act.

In February 1946, the Department of Justice and its Antitrust Division determined indicia existed of violations of the antitrust laws by defendant, E. I. duPont de Nemours and Company, in the field of cellophane. Thereupon, extensive inquiry was made as to the manufacture and distribution of cellophane, caps and bands. The records of many companies, involved in this industry, were examined. Then in September 1946, defendant submitted documents from its files. They filled 15 large shipping crates. This material was neither classified nor
490 collated. Attorneys for the Antitrust Division examined each document and made a selection of those which they considered contained evidence pointing to violation. An estimate shows that about 100,000 documents were read and considered in the investigatory stage.

This suit was started, and in November 1948, defendant itself sought discovery; thereupon plaintiff made available approximately 5,000 documents it considered to be relevant to the issues. Thereafter the Antitrust Division, on behalf of plaintiff, continued its efforts to narrow the documentary proof to an irreducible minimum; and in February 1950, submitted to me 2,591 documents which it then relied on for its case in chief. This month plaintiff further attempted to reduce its documentary proof by voluntarily withdrawing 592 documents. It appears the totality of documents making up plaintiff's proffer represents less than

2% of all documents read and considered in the course of
491 the investigation. At the argument on defendant's motion to strike all exhibits proffered by the government, it demonstrated that its theory of the case is divided into approximately 300 specific points of proof; and each of the 1,999 remaining documents making up plaintiff's proffer has been categorized under this point system. Plaintiff states in shrinking its documentary proof every effort has been exerted to avoid cumulation, duplication, repetition and trivia. In good faith, says plaintiff, it believes this effort has been successfully carried out; moreover, a reading and consideration of each of its documents will demonstrate they are of such nature with relation to the issues involved that it would be impossible to direct the court's attention to any segment of its evidence and state that it is more deserving of attention than the remainder. Finally, plaintiff argues to grant defendant's alternative motion requiring the government to furnish a list of 300 documents, or any like restricted number,
492 would result in a distorted picture and seriously prevent the presentation of plaintiff's case as it thinks it should be presented.

1. In support of its present motion, defendant asks that plaintiff's exhibits Nos. 1 to 391, 1001 to 1457, 2001 to 2797, 4001 to 4441, and 5001 to 5515, be stricken, without prejudice to plaintiff to reoffer such exhibits on or before December 21, 1950, providing plaintiff shall not reoffer any of these exhibits if they fall in the following categories:

(1) Duplicates, i. e., more than one copy of any exhibit.

(2) Routine letters of transmittal or referral.

(3) Documents reflecting routine corporate or committee action with respect to any agreement where defendant has
493 stipulated the authority of the signing officials, or has been precluded by pretrial order from objecting to the agreement on the ground of lack of proof of authority of the signing officials.

(4) Documents such as price lists and royalty statements which can be summarized in tabular form, unless plaintiff shows that it has made an unsuccessful bona fide effort to stipulate tabulation with defendant.

(5) Drafts of contracts except such drafts as are substantially different from the final contract where plaintiff relies on the substantive difference.

(6) Documents merely showing facts admitted by defendant by way of answer or in response to written interrogatories.

494 (7) Documents consisting entirely of data contained in other exhibits, or of quotations from other exhibits.

(8) Multiple copies of form contracts as to which a single contract, plus a list of contracting parties and dates of execution will provide the identical information.

(9) Such further and additional cumulative, repetitious or inconsequential documentation as plaintiff feels it can dispense with in the initial presentation of its documentary case without prejudice to its position on the merits.[3]

495 2. For purposes of technical clarification, defendant's motion to strike is not properly denominated because nothing exists to strike as no documents of any kind have been admitted in evidence. In fact, defendant's attack by its motion is upon the number of evidentiary writings the government may proffer in support of its case. In passing on defendant's motion it would appear, therefore, the sole objective is to limit plaintiff's right to proffer evidence.

The cases show a marked liberality in the admission of evidence in antitrust cases for the reason, I think, that this type of litigation is mainly *sui generis* as to each case. In these cases, of course, the liberality of Rule 43 (a) of the Federal Rules of Civil

496 Procedure is applied.[4] To sustain a charge of illegal monopoly, it often becomes necessary for the entire corporate practice of an indicted company to be subject to inquiry.[5] And to prove the monopolistic plan under scrutiny discloses an acquisition of illegal monopoly power with a concomitant illegal intention to maintain such power, every circumstance which has a reasonable tendency toward such proof, has been held admissible.[6]

The plaintiff's case here will obviously be documentary in nature. The charges of the government in this action make the scope of the issues encompass the operation of the entire cellophane industry throughout the world during a quarter of a

497 century. The issues will be numerous. Obviously the documentary proof will, of necessity, be weighty; but not in comparison with other antitrust litigation, especially in view of what already has been accomplished by the jettison of documentary cargo pursuant to pretrial suggestion. After making a spot check and examination of the numerous writings contained in plaintiff's proffer, I have concluded the Antitrust Division has voluntarily and in accord with the statements made at former pretrial conferences, made a bona fide attempt to narrow the plaintiff's "documentary proof to an irreducible minimum" and

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[3] Moreover, defendant reserves the right to object to the admissibility of any of these writings which may be offered by plaintiff except to the extent that specific grounds for objection have been waived as noted in previous orders of the court.

[4] Pfotzer v. Aqua Systems, 2 Cir., 162 F. 2d 779, 785; U. S. v. Vehicular Parking, D. C. Del. 52 F. Supp. 751, 754; U. S. v. General Electric Co., 82 F. Supp. 753, 903.

[5] U. S. v. General Electric Co., 82 F. Supp. 753, 903, 904.

[6] Swift and Company v. U. S., 196 U. S. 375, 396; Pfotzer v. Aqua Systems, 2 Cir., 162 F. 2d 779, 785; U. S. v. Schine Chain Theatres, 63 F. Supp. 229, 234–235, aff'd 334 U. S. 110.

have, in effect, accomplished, in substance, the very objectives sought by defendant's present motion.

Admittedly, the purpose of adopting pretrial procedural techniques in connection with the introduction of mass documentary proofs in antitrust cases is not only laudable but necessary in view of the gargantuan dimensions current antitrust litigation is assuming. In reducing the time element of trial and crystal-
498 lizing supporting proofs for the trial judge's consideration, careful attention, however, must be given that innovations in this field should not be designed to deprive government counsel—or defense counsel—of the right, within reasonable bounds, to control the preparation and presentation of their respective cases. Under the circumstances which have so far been presented to me, I have concluded a court should be careful not to thwart the privilege of a litigant to make an offer of proof, for the precise matter decided here deals with a proffer of proof. It does not deal nor is it intended to deal with what particular document is admissible or what will, in fact, be considered by the court in arriving at its ultimate decision of the merits of the case. To this extent the action to be taken is not in conflict with the
499 authorities[7] cited by defendant in support of a novel restriction sought to be imposed upon a proffer of proof by a plaintiff. Accordingly, an order may be submitted denying defendant's present motion and its prayers.

Dated November 29, 1950. Wilmington.

500 In United States District Court

[Title omitted.]

Order

(Filed December 7, 1950)

On motion of defendant for an order to strike all documentary exhibits proffered by the United States or, in the alternative, to direct the United States to file with the Court a list of the proffered exhibits upon which the plaintiff primarily relies, such a list not to exceed 300 exhibits, and to strike all proffered exhibits not contained in the list, and after hearing counsel on said motion, it is, in accordance with the Court's opinion of Nov. 29, 1950,

Ordered, that said motion be, and the same hereby is, in all respects denied.

(S) PAUL LEAHY,
United States District Judge.

Dated December 7, 1950.

[7] U. S. v. United Shoe Machinery Corp., CA No. 7198, D. C. Mass. 1950; U. S. v. Imperial Chemical Industries Ltd., et al., CA Nos. 24-13, D. C., S. D. N. Y. 1950.

500A In United States District Court

Trial Conference Order No. 3

2:15 o'clock p. m., May 25, 1951.

Present:

As before noted.

(A conference was held in the Court's chambers, at which time the following matters were discussed:)

1. It is understood that Defendant's motion for judgment made on May 3, 1951, that the Government has not sustained its case with reference to caps and bands will not be pressed at this time. The motion is reserved. Disposition of it will be made prior to the termination of the case.

2. The Defendant has during the course of the trial objected to certain exhibits. These can be placed in three groups:

The first group comprises GX 329, 332, 339; Group 2, GX 5479, 5481, 5482, 5484, 5488; the third Group contains GX 548. The grounds of objection will not be set forth for the purposes of this memorandum. However, the Government shall have an opportunity to examine these exhibits in order to determine whether it will insist upon their introduction or will withdraw the same. If there is to be argument, it will be had on next Tuesday, May 29th.

3. The question as to the right of the Defendant to adduce post-complaint evidence will be handled in the following manner:

Defendant will propose a series of amendments to its Answer which will raise the issue. The Government will object to the proposed amendments. The Court will decide whether the amendments should be allowed and thus determine the issue as to

500B what evidence, in connection with this phase of the case, will be permitted when the Defendant opens it case. There will be a reservation, however, that this ruling, insofar as it pertains to the evidence question, will not bind the Government if it has any additional cogent reason for the exclusion of such evidence. Defendant in following this procedure for the purpose of focusing the issues does not thereby concede that amendment of the Answer is essential as a preliminary to the introduction of the proof.

4. In accordance with paragraph 2 of Supplemental Pre-Trial Order Number 2, Defendant will submit a written offer of proof on the subject of competition between cellophane and other materials to the Court and Plantiff sometime next Tuesday, May 29, with a view to an oral argument on Plaintiff's motion opposing the admission of this material being had the following Thursday. When

the matter is argued, counsel for Defendant will present the offer with such explanatory statements as to the underlying facts as are deemed necessary, to be followed by discussion of the applicable legal principles.

5. At an early stage in the proceeding the Court inquired of Government counsel as to whether or not there would be more specificity as to the prayers for relief. At the time the inquiry was made the Government stated it would furnish the Court with such a statement. The Court was prompted in making its inquiry, in the first instance, by the fact that it wished to place the Government's evidence in juxtaposition to its specific form of relief. Since the Defendant has stated it is not going to press its motion for judgment on the Government's case, the Court has no further interest in pressing its inquiry as to specificity of relief.

6. The matter of the resumption of the trial was discussed and it was determined that the defense would commence its introduction of documentary proofs on October 8th, running through to October 12th and, if necessary to consume so much of the week of October 15th as will be required.

5000 Thereafter the trial will resume on October 24, 25, 26, 31, November 1, 2, 7, 8, 9, 14, 15, and 16. Sometime before the last date mentioned another conference will be had between counsel and the Court to determine the rest of the trial program.

7. Defendant will submit on August 1, 1951, to Plaintiff the documents it intends to introduce in evidence, subject, of course, to the provisions of the earlier pre-trial orders. These documents shall be arranged in the order of Defendant's proof and theory of its case and shall be identified by exhibit number. Defendant has stated that the arrangement of its documents will coincide precisely with the order of its presentation of such documents when the trial reconvenes on the 8th of October. The Government will be required to file their objections to any such documentary proof with Defendant not later than September 10th.

Defendant will advise the Government within a reasonable time prior to the appearance of its witnesses of the name of the particular witness who is to be called. In the event the witness is to authenticate specific exhibits contained in Defendant's case, Defendant will advise Plaintiff of the exhibit numbers reasonably in advance of the witness appearing on the stand.

By the Court:

Chief Judge PAUL LEAHY.

(At this point the trial was adjourned to Tuesday, May 29, 1951, at 10:30 o'clock a. m., E. D. S. T.)

340506—55—vol. 1——4

501 In United States District Court
[Title omitted.]

Motion for leave to file amended and supplemental answer

Filed May 28, 1951

Defendant moves the court for leave to file an amended and supplemental answer to paragraphs 21, 22 and 23 of the Complaint, a copy of which is hereunto annexed. The grounds of this motion are that by reason of developments at the trial defendant desires to make more explicit the allegations of its pleadings as to post-complaint events, transactions and occurrences and as to the competition which is met and continuing to be met by cellophane and caps and bands.

(S) JAMES H. MCGLOTHLIN,
COVINGTON & BURLING,
701 Union Trust Building, Washington, D. C.
MORRIS, STEEL, NICHOLS & ARSHT,
3018 Du Pont Building, Wilmington 41, Delaware,
Attorneys for Defendant.

Proof of service [omitted in printing].

502 *Amended and supplemental answer to paragraphs 21, 22, and 23 of the complaint*

Filed May 28, 1951

Defendant's answer to Paragraphs 21, 22 and 23 of the Complaint is hereby amended and supplemented to read as follows:

"21, 22 and 23. Du Pont denies each and every allegation of each of these paragraphs; and in further response avers:

1. Other manufacturers of cellophane and of caps and bands, including the alleged co-conspirators, compete with duPont in the manufacture and sale of such products both in the United States and abroad and this competition has continued since the date of the filing of the complaint.

2. Since the filing of the complaint, domestic manufacturers of such products have increased capacity and an additional manufacturer has entered into the manufacture and sale of cellophane in the United States on a substantial scale.

503 3. Cellophane competes with other functionally interchangeable flexible packaging materials which are sold in the market at the same time, for the same end uses, to the same classes of customers as cellophane, and such competition has continued since the date of the filing of the complaint.

4. Comparable competition exists between caps, bands and other products and such competition has continued since the date of the filing of the complaint.

5. Neither prior to or subsequent to the filing of the complaint has du Pont had control of the markets in the United States in which cellophane and caps and bands are sold, or possessed any of the powers alleged."

(S) JAMES H. McGLOTHLIN,
COVINGTON & BURLING,
701 Union Trust Building, Washington, D. C.,
MORRIS, STEEL, NICHOLS & ARSHT,
3018 Du Pont Building, Wilmington 41, Delaware,
Attorneys for Defendant.

MAY 28, 1951.

504 In United States District Court

[Title omitted.]

Order granting leave to file amended and supplemental answer

(Filed May 29, 1951)

And, now, to-wit, this 29th day of May, 1951, the motion of defendant for leave to file an amended and supplemental answer to paragraphs 21, 22 and 23 of the complaint having come on to be heard, and having been argued by counsel for the respective parties, and the matter having been considered by the Court,

It is ordered by the Court that said motion be and it hereby is granted and that the proposed amended and supplemental answer annexed to said motion shall be filed as and for defendant's amended and supplemental answer to paragraphs 21, 22 and 23 of the complaint.

(S) PAUL LEAHY,
Chief Judge.

505 In United States District Court

[Title omitted.]

Order requiring depositions be accompanied by a narrative summary of the contents

(Filed January 9, 1952)

1. Either party that presents a deposition at the trial shall file with it a succinct narrative summary of the contents, and serve a copy of such summary upon the opposing party.

2. If the opposing party contends that there are inaccuracies in such summary, within 30 days after the filing of the summary it shall file with the Court and serve upon the other party a statement of the specific portions of the summary deemed inaccurate with references to the portions of the transcript asserted to establish each inaccuracy.

3. In the absence of material inaccuracies in the summary, the summary shall be regarded for all purposes of the case as an accurate and complete statement of the contents of the deposition, and shall be received in evidence in lieu of the verbatim transcript of the deposition, subject to the following reservations:

(a) Either party may make objections as to the Materiality or competency of any part of the summary.

(b) Either party may offer in evidence the verbatim transcript of the testimony of a witness whereby the party deems the summary to be in conflict with such testimony.

506 (c) Either party may offer in evidence all or any part of a deposition if such party considers that necessary to its case.

(S) Paul Leahy.
PAUL LEAHY.

Date January 9, 1952.

* * * * *

690 In United States District Court

Civil Action No. 1216

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DUPONT DE NEMOURS & COMPANY, DEFENDANT

James L. Minicus, Julius C. Renninger, Joseph M. Fitzpatrick, Philip L. Roache, Jr., Matthew Miller and Forrest A. Ford, all of Washington, D. C., and William Marvel, U. S. Attorney, of Wilmington, Del., for the United States of America.

Gerhard A. Gesell, James H. McGlothlin, David C. Acheson, Harvey Levin and George J. Kuehnl (of Covington and Burling), of Washington, D. C.; Hugh M. Morris and Alexander L. Nichols (of Morris, Steeel, Nichols and Araht), and Francis J. Zugehoer, of Wilmington, Delaware, for defendant.

691 *7th trial memorandum*

(Filed September 4, 1952)

LEAHY, Chief Judge.

The Government has offered in evidence four affidavits to which duPont has objected. The documents are marked GX 2917 (Reichel), GX 2918 (Hills), GX 564 (Replogle), and GX 565 (Stiner).[1] The Government asserts two grounds of admissibility: 1. all are admissions of an alleged co-conspirator; 2. The Reichel and Hills affidavits are prior contradictory statements which go to impeach the testimony of duPont witness Reichel. The basis of duPont's objection to the admission of these documents is they are hearsay. For purposes of arguing
692 admissibility here, duPont conceded the assumption made by the Government—a conspiracy between duPont and Sylvania and the latter's successor American Viscose had been shown.

All deponents were intimately connected with the management of Sylvania, Reichel as President, Hills as Secretary and General Counsel, Replogle as Vice President in charge of Sales, and Stiner as its highly competent salesman. The documents in question are sworn affidavits submitted to the Bureau of Internal Revenue by Sylvania's successor corporation in a proceeding wherein it sought and obtained a $1,000,000 tax refund.

1. A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties.[2] duPont contends, however, the criterion of admissibility of the declaration is "the making" and the
693 statement can only come in if "the making" is itself in "furtherance of the conspiracy." I think it sufficient for purposes of admissibility of the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy or is explanatory of acts done in furtherance of the objects of the conspiracy.[3] Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy.[4] duPont cites authority holding

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[1] Reichel's and Hills' affidavits discuss *inter alia* an informal opinion given Sylvania in 1935 of illegality of the duPont-Sylvania license agreement and describe the circumstances of that opinion. Reichel, in addition, discusses Sylvania's record of production and shut-downs over the years. GX 564 and GX 565 discuss the production, marketing, and uses of Sylvania cellophane and Sylvania's over-sold condition during the experience of Replogle and Stiner.

The Replogle affidavit is dated August 31, 1949; Reichel, September 7, 1949; Hills and Stiner, September 8, 1949.

[2] Schine Theatres v. United States, 334 U. S. 110 116–17; United States v. Crescent Amusement Co., 323 U. S. 173, 184.

[3] Wigborg v. United States, 163 U. S. 632, 657–658.

[4] Clune v. United States, 159 U. S. 590, 593; Conn. Mut. Life Ins. Co. v. Hillman, 188 U. S. 208, 215–218; Vitagraph, Inc. v. Perelman, 3 Cir., 95 F. 2d 142, 146, cert. den. 305 U. S. 610. See also International Indemnity Co. v. Lehman, 7 Cir., 28 F. 2d 1, 4.

inadmissible co-conspirators' declarations if made after the conspiracy had ended.[5] This, however, is not the question presented to me, for a conspiracy has been assumed without any time limit; furthermore the Government alleges the conspiracy was in
694 full bloom in 1949, the time of the making of these affidavits.

2. The extent to which evidence of the character now presented should be admitted, is much in the discretion of the trial court. Perhaps, where there is no jury this discretion is even broader. The judge, as factfinder, must be assumed vis-a-vis the orthodox juror, to have a particular competence in evaluating evidence. At this time, I think the affidavits should be admitted subject to be stricken if I find no conspiracy has been shown. My ruling makes unnecessary any comment by me on the other grounds of admissibility urged by the Government.[6]

The writings will be admitted.

WILMINGTON, *September 4, 1952.*

* * * * *

[5] Logan v. United States, 144 U. S. 263; Krulevitch v. United States, 336 U. S. 440.

[6] Both parties agree Reichel's affidavit is admissible as a prior contradictory statement. duPont argues for a limited use of the affidavit even if admitted on this ground.

1385 In the United States District Court for the District of Delaware

Findings of Fact, Conclusion of Law and Opinion of Chief Judge Paul Leahy

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1391 In the United States District Court for the District of Delaware

Civil Action No. 1216

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DUPONT DE NEMOURS AND COMPANY, DEFENDANT

William Marvel, U. S. Atty., of Wilmington, Del., James L. Minicus, Julius C. Renninger, Philip L. Roache, Jr., Joseph M. Fitzpatrick, Matthew Miller, Forrest A. Ford, Newell A. Clapp, Marcus A. Hollabaugh, Margaret H. Brass, Mollie Strum, William Amory Underhill, Joseph F. Tubridy and William J. McAuliffe, Jr., Sp. Assts. to the Atty. Gen., all of Washington, D. C., for plaintiff.

Hugh M. Morris and Alexander L. Nichols (of Morris, Steel, Nichols & Arsht), of Wilmington, Del., Gerhard A. Gesell, William M. Aiken, James J. McGlothlin, David C. Acheson, Harvey Levin and George Kuehn (of Covington & Burling), of Washington, D. C., and Francis J. Zugehoer, of Philadelphia, Pa., for defendant.

Opinion

(Filed December 14, 1953)

LEAHY, Chief Judge.

This is a civil suit by United States of America under § 4 of the Sherman Act, charging defendant with monopolizing, attempting to monopolize and combining and conspiring to monopolize trade and commerce among the several states of the United States in cellophane and caps and bands. The Act of July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act, as amended, provides in part:

1392 "SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor. * * * [15 U. S. C. § 2].

* * * * * * *

"SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations * * * [15 U. S. C. § 4]."

This case was instituted originally in the District Court of the United States for the District of Columbia on December 13, 1947. On April 28, 1949, the case was transferred to the District of Delaware.

Defendant, E. I. duPont de Nemours and Company, is a Delaware corporation. It is successor to duPont Cellophane Company, Inc. Throughout the period covered by the complaint, it or its predecessors manufactured and sold, in interstate and foreign commerce, regenerated cellulose in the form of film (cellophane) and in the form of bands. Prior to the filing of the complaint in this case, it also manufactured and sold cellulosic caps.

DuPont entered the cellophane business in 1923. It collaborated, under written agreements with La Cellophane (a subsidiary of the Comptoir which is the largest French rayon producer), in establishing the first duPont cellophane company. In 1929 duPont Cellophane Company, Inc., was reincorporated as a wholly owned subsidiary of duPont. In 1936, duPont took over the operation of this business and dissolved duPont Cellophane Company, Inc.

1393 In addition to La Cellophane, the following European producers have been named as co-conspirators but not party defendants: British Cellophane, Ltd. (England); Canadian Industries, Ltd. (Canada); Kalle & Co. (Germany); Viscose Francaise (France); and Viscose Development Company, Ltd. (England).

Plaintiff's argument and briefs treated in a highly interesting fashion the comparison of the economic and legal concepts of monopoly. But the final legal definition of the economic view of monopoly is to be left for decision by the Supreme Court.

Comparison of the Economic and Legal Concepts of Monopoly

Economic philosophies concerning monopoly and what should be done about it are legion; no one view can be said to be "the economic" concept. While these philosophies can not be classified into air-tight compartments, they do fall into distinct schools of thought. These schools are presently engaged in debate over the degree of monopoly power which is economically desirable and which the law should permit. The economic discussion had its genesis in an attempt to bridge what was believed to be a gap between the legal and economic concepts of monopoly. This discussion has resulted in some agreement among economists upon classifications of various types of competition which exist in the market today, but in sharp disagreement upon their significance as indicia of monopoly.

Plaintiff contrasted first the legal and economic concepts of competition and monopoly as presently understood, and as affected by potential competition and the presence of substitute products. Second, it discussed the coalescence of the old patterns of economic and legal thought. Third, it discussed the economic concepts of monopoly whose application is proposed for the future and their contrast with the existing legal tests of monopoly.

1394 THE PRESENT ECONOMIC AND LEGAL VIEWS OF MONOPOLY AND COMPETITION

Recent economic discussion has focused attention upon differences of opinion which exists among economists themselves and between economists and the courts as to the type and degree of competition which public policy, as expressed in the Sherman Act, contemplates. Differences also appear in the significance certain economists and courts attach to potential competition and to presence in the market of alternative or substitute products.

a. COMPETITION AND MONOPOLY IN THE ECONOMIC SENSE

Today economists regard "perfect competition" and "pure monopoly" only as theoretical ideals of the opposite boundaries of possible market situations.[1] While economists have not crystallized their terms, in a semantic sense, they recognize between the two extremes of perfect competition and pure monopoly there are "pure competition," "imperfect competition", "oligopoly", and "monopolistic competition".[2] We start, Clark tells us, "with recognition that all practicable forms of competition and 'imperfect', and that the 'perfect competition' of economic theory is academic".[3] Pure competition, sometimes defined as a less perfect form of competition than perfect competition, has been said by Mason to be that state of the market wherein "no buyer or seller could, by his own action, influence the price of the goods
1395 to be bought and sold."[4] Mason views the concept of "pure competition of the economic theorists" as "divorced

[1] Stocking and Watkins, Monopoly and Free Enterprise, Twentieth Century Fund, pp. 13, 49 (1951); J. M. Clark, Alternative to Serfdom, pp. 68–69 (1948); Oppenheim, Divestiture as a Remedy Under the Federal Anti-Trust Laws, Economic Background, 19 G. Wash. L. Rev., pp. 120–122 (1950).

[2] Stocking and Watkins, p. 13; Clark, Toward a Concept of Workable Competition, 30 Am. Econ. Rev., June 1940, pp. 241–56, reprinted in Readings, pp. 452–75.

[3] Clark, Guideposts in Time of Change, p. 143 (1948).

[4] Edward S. Mason, Current Status of the Monopoly Problem, 62 Harv. L. Rev. 1265, 1272 (1949). Clair Wilcox states: "Under pure competition, information as to present and prospective conditions of supply and demand may be imperfect or unequally distributed; custom may restrain complete independence of action; friction may impede the movement of capital between industries, products, and firms; minor obstacles may limit access to and withdrawal from the field. But other of the conditions of perfect competition must be preserved; commodities must be standardized; sellers and buyers must be numerous and small; no one of them may control enough of the supply or the demand appreciably to affect the price; each of them must take price as given and adjust his output or purchases to it. * * * Pure competition undoubtedly does exist, but its occurrence is comparatively rare." Wilcox, Competition and Monopoly in American Industry, TNEC Monograph No. 21, p. 3 (1941).

from time and space and independent of technological and other considerations."[5]

Imperfect competition in economic parlance is a term which includes all market situations falling between pure competition and pure monopoly, including what is known as oligopoly and monopolistic competition.[6] Monopolistic competition is now recognized as embracing those situations where either a few or many sellers trade in differentiated products, whereas "oligopoly" is regarded as consisting of those situations where a few sellers sell only a standardized product.[7]

There is much debate among economists with respect to the significance which should be attached to market behavior in industries which are oligopolistic.[8] While some economists take the view oligopolistic competition or oligopolies controvert the spirit of the antitrust laws, others contend oligopolies are able to pass along the benefits of efficiency of size to the consumer and are not socially disadvantageous.[9] Some admit in oligopolistic industries a considerably higher degree of competition than that which exists would be "workable" or effective.[10]

1396 In attempting to evolve an economic approach to the concepts of monopoly and competition, some economists have proposed a theory of "Workable competition."[11] This theory has, as yet, received no precise definition.[12] Rather it is an approach by which some economists propose to determine, in any given industry, whether the industry is competitive or monopolistic, and what degree of competition is obtainable by a practical policy without substantial loss of efficiency.[13]

Monopoly, then, in economics, is not the simple test of perfect monopoly. In between the theoretical economic concepts of perfect competition and perfect monopoly lie various forms of imperfect competition which possess varying degrees and characteristics of monopoly. Pure monopoly which stands at the other extreme in economic thought from pure competition, has been defined by Stocking and Watkins as follows:[14]

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[5] Mason, Workable Competition versus Workable Monopoly, Symposium under Federal Antitrust Laws, 1951, CCH, pp. 67, 68.

[6] See Stocking and Watkins, op. cit., p. 13; Clark, Readings, pp. 458-9.

[7] See Stocking and Watkins, op. cit., pp. 13, 86, n. 7; Clark, Readings, op. cit., pp. 458-9. Chamberlin first defined "monopolistic competition" as a broad term, including within it oligopolistic situations involving a few sellers of either standard or differentiated products as well as situations involving many sellers of differentiated products. Chamberlin, The Theory of Monopolistic Competition, Harvard University Press (1933).

[8] See Stocking and Watkins, op. cit., pp. 110-111.

[9] Compare Stocking and Watkins, op. cit., p. 296, with Mason, The Antitrust Laws: A Symposium, 39 Am. Econ. Rev. 689, 713 (1949).

[10] Fellner, Competition Among the Few, p. 290.

[11] Clark, Toward a Concept of Workable Competition, op. cit., Readings, pp. 452-475.

[12] Stocking and Watkins, op. cit., p. 97.

[13] Fellner, op. cit., p. 200.

[14] Stocking and Watkins, op. cit., p. 13, n. 8, p. 49, n. 89. See also: Clark, Alternative to Serfdom, pp. 68-9, who points out that if one were to ask any graduate student to define "monopoly", "He may start by telling you that there is an element of monopoly in all trading, but he will probably not start with a definition of

"Pure monopoly means a single seller of a product for which no substitute is available. But, like perfect competition, such a monopoly is a theoretical ideal."

While some economists stress what they believe to be the efficiencies of oligopoly, others believe while a competitive structure may have imperfections, it is nevertheless the greater spur to progress and benefits to society. Corwin Edwards states: [15]

"But although the maintenance of competition will not
1397 guarantee that the economy will work well, impairment of competition by monopolistic restrictions, public or private, increases the chance that it will work badly. Although the imperfections of the competitive process are too great to make economic adjustments quick, neat, and exact, the forces of competition tend to reduce many substantial economic maladjustments."

Stocking and Watkins state: [16]

"To maximize his earnings a monopolist must so regulate the inflow of new capital as not to impair the value of the old, whether it is a question of new processes or of new products that will compete with old. Where a monopolist can realize profits from a new product only by accepting smaller revenues from an old, he will be reluctant to introduce the new. Unless he can expect a monopoly return from the new that more than offset the losses of Monopoly revenue from the old, he will not put the new product on the market. A monopolist restricts not only output but new investment as well. In this way monopoly tends to block innovation and change, to retard technological progress and to deprive society of its benefits."

b. THE COMPETITION INTENDED BY THE SHERMAN ACT

Plaintiff shows the Sherman Act does not define the degree of competition which its policy contemplates, nor label it as either "perfect", "pure", "monopolistic", or "atomistic". The purpose of Congress in passing the Sherman Act was to preserve our system of free trade and competitive economy in order to protect the public from the evils thought to flow from undue restraints and monopolies. The object of Congress was "to secure competition and preclude combinations which tend to defeat it." International Harvester Co. v. Missouri, 234 U. S. 199, 209. The
1398 purpose of the statute was "to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or

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'perfect' monopoly, which turns out, like perfect competition, to be nonexistent, or substantially so, outside Soviet Russia." And see: Oppenheim, op. cit., p. 122, who points out that the "perfect" monopoly of earlier economists is now generally considered to be an abstraction.

[15] Edwards, Maintaining Competition, p. 8 (1949).

[16] Stocking and Watkins, op. cit., pp. 11–12; see also: Fellner, op. cit., p. 288

who wish to engage, in trade and commerce—in a word, to preserve the right of freedom of trade." United States v. Colgate & Co., 250 U. S. 300, 307.

As Chief Justice White remarked in Standard Oil Co. v. United States, 221 U. S. 1, 56, 31 S. Ct. 502, both at common law and under the Sherman Act, "practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and the remedying of the evils which it produced."

C. THE ECONOMIC VIEW OF THE EFFECT OF POTENTIAL COMPETITION UPON MONOPOLY

Freedom of entry of new firms into a given industry has been suggested by some economists as the distinguishing feature between competitive and monopolistic industries. As pointed out by Stocking and Watkins: [17]

"Economists who believe it impracticable to change greatly the structure of American industry count on potential competition and the competition of substitute products to make the existing structure of industry workably competitive by curbing monopoly power over the long run."

Under this approach the continuation of monoply is condoned so long as there is sufficient likelihood potential competition will act as a brake upon the monopolist's use of its power, and regardless of the effect which the monoply may have upon actual competitors.

Edwards views potential competition as a curb upon monopoly power "so long as entry is easy." [18] Clark, who thinks in-
1399. tries having large scale production may be competitively workable, ascribes lesser effect to the power of potential competition. He says neither potential competition nor the presence of substitutes "is a perfect check; but both together may come near it under favorable conditions." [19] Lewis represents another view when he states: [20]

"The key to the effectiveness of competition is to be found in its power systematically and predictably to compel economic decisions, and I do not believe that any such power or force characterizes the competition present in industries composed of, or dominated by, either a single firm or a few large firms. * * * To speak of potential competition as a compelling regulatory force in this situation is to be blind to the strength of the factors that retard and will continue to retard the drive of potential competition to become actual competition."

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[17] Stocking and Watkins, op. cit., p. 98.
[18] Edwards, op. cit., p. 186.
[19] Clark, Toward a Concept of Workable Competition, op. cit., Readings, p. 460.
[20] Lewis, The Antitrust Laws: A Symposium, 1949, 39 Am. Econ. Rev., pp. 689, 707.

Plaintiff argues potential competition does not serve as adequate legal test of the existence of monopoly, although the ability of new firms to enter an industry may give some indication of the strength of the barriers erected by the monopolist. One eminent legal writer, Milton Handler, pointed out some time ago that a combination may be held unlawful even though it has imposed no restraints upon new competition. Handler stated: [21]

"Many economists who have disagreed with the major purpose of the anti-trust laws have felt that the public is adequately safeguarded if potential competition remains free and unfettered at all times. This is not the premise on which the Sherman Law is based. The instrument of control under this statute is both actual and potential competition."

1400 d. THE ECONOMIC VIEW OF THE EFFECT OF SUBSTITUTE PRODUCTS UPON MONOPOLY

Economists differ on the question of what significance should be attached to the presence in the market of products which are substitutes or alternatives for the products said to be monopolized.

In an address before the New York State Bar Association in 1950, Professor Meriam decried the action of Judge Learned Hand in United States v. Aluminum Co. of America, 2 Cir. 148 F. 2d 416, both in restricting his consideration of the product involved to virgin aluminum ingot and ruling out secondary aluminum which competes with virgin, and in paying "no attention to the very significant business fact that aluminum competes with other light metals of different chemical composition." [22]

Other economists point out there are few commodities for which no substitutes are available.[23] The "monopolistic competition" school of thought is based upon the premise differentiation in products confers some degree of monopoly power. Wallace, in expressing his understanding of that school of thought, states: [24]

"The theory of monopolistic competition emphasizes the significance of variation or differentiation of products. Successful differentiation confers some monopoly power by attracting a clientele which has some preference for the article of a particular seller."

Chamberlin, a pioneer of the monopolistic competition school states: [25]

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[21] Handler, Industrial Mergers—Antitrust Laws, 32 Col. L. Rev. 179, 258 (1932).
[22] Meriam, The Sherman Antitrust Act and Business Economics, Antitrust Law Symposium, 1950, p. 98.
[23] See Stocking and Watkins, op. cit., p. 503, where it is noted that aluminum is interchangeable in electrical transmission lines and that it also competes with "light steel, plywood and more recently with plastics, in the making of furniture, household appliances, and other products. Plastics compete with leather, rubber, and glass."
[24] Wallace, Monopolistic Competition and Public Policy, 36 Am. Econ. Rev., March 1936, pp. 77–87.
[25] Chamberlin, The Theory of Monopolistic Competition, Chap. 9, pp. 65–67, Harvard University Press (1948).

1401 "A monopoly of 'Lucky Strikes' does not constitute a monopoly of cigarettes, for there is no degree of control whatever over substitute brands. But if, in order to possess a perfect monopoly, control must extend to substitutes, the only perfect monopoly conceivable would be one embracing the supply of everything, since all things are more or less imperfect substitutes for each other. * * * The term 'monopoly' is meaningless without reference to the thing monopolized. A monopoly of diamonds is not a monopoly of precious stones, nor, to go still further, of jewelry. Differentiation implies gradations, and it is compatible with perfect monopoly of one product that control stop short of some more general class of which this product is a part, and within which there is competition."

After pointing out this idea was no departure from accepted doctrine, and citing as his authority both Taussig and Ely,[26] Chamberlin writes (p. 67):

"Of course, prices might be higher yet if, instead of a monopoly of each different brand, there existed a monopoly of the entire class of product. The more substitutes controlled by any one seller, the higher he can put his price. But that is another matter. As long as the substitutes are to any degree imperfect, he still has a monopoly of his own product and control over its price within the limits imposed upon any monopolist—those of the demand."

Clearly, there are different schools of thought in economic circles with respect to the effect upon monopoly of the presence of substitute products.

In general, plaintiff charges defendant maintains a monopoly position in the production and sale of cellophane and bands. It is charged defendant unlawfully acquired and maintains a
1402 monopoly position in the field of cellophane and bands—that defendant's predatory practices in the markets for these products demonstrate an intent to monopolize and the exercise of monopoly power. The unlawful acquisition is traced, in the beginning, to defendant's foreign relations with European companies, which resulted in a cartel which divided world markets. There is the charge of abuse of patents; exclusionary and oppressive acts and practices; and restraint of trade in distribution of the products in connection with both direct and indirect sales.

[26] Taussig: Principles of Economics, 3rd Ed. revised, Vol. II, p. 114, and Ely, Monopolies and Trusts, p. 35.

PART I—CELLOPHANE

Certain issues of fact and law must control the decision in this case. When these controlling issues are isolated, it will be apparent there are fatal deficiencies in the Government's proof, and the record fails to establish those facts which are essential to support the charges in the complaint.

The history of duPont's cellophane business is a record of competitive achievement. DuPont was the first American company to manufacture this new wrapping material. To pioneer the cellophane business required foresight, and a willingness to take risks. DuPont had little technical experience in this line of chemistry. The product had not been proven as a packaging material. It had had little acceptance in this country.

DuPont entered the business in the only manner that was practicable. It acquired the commercial process from the French. This process was obtained on the best terms duPont could negotiate. The two groups, American and French, had already been successful partners in rayon. No desire to limit competition was involved, for neither partner to the venture was engaged in business in competition with the other, and there is no indication anyone was interested.

DuPont saw the change for profit and utility for cellophane if it could be introduced into the mass production packaging
1403 markets of the United States. It decided to bring a new competing material into the flexible packaging market, an established field of competitive business activity.

Cellophane was not at first acceptable in the trades to which it was offered. Manufacturing techniques were crude; quality unsatisfactory, and costs made price of cellophane prohibitive for many uses. There were distribution and merchandising problems to be met. Only by effective competition could duPont hope to gain recognition for its product in markets where other materials were entrenched. The business had to be built up by creative research.

DuPont's technological achievements were of high order. Through research it improved manufacturing efficiency, reduced costs, improved quality, developed new types of materials and lowered prices to obtain acceptance for its product, all in the face of competition. Research results were continuously put to use in its plants.

The product obtained from the French did not meet the needs of the American market. DuPont invented a new product, moistureproof cellophane, which proved to be the product upon which the cellophane business has been built. It obtained a product patent under which all its moistureproof cellophane was produced

during the period of the monopoly charged in the complaint. It then exploited that patent, well within the purposes and intentions of the patent grant. Its production expanded; it made many types of moistureproof cellophane; it gave increasing service to its customers; it neither curtailed its initiative nor restricted the capital which it was willing to devote to the enterprise. DuPont achieved through business method an increasing success in its competition with other packaging materials.

As cellophane got recognition in the trade, others entered various phases of the business as converters, users, suppliers of raw materials, manufacturers of equipment, and the like. Cellophane creates competition. Throughout the flexible packaging markets this competition is felt. It stimulates efforts of other producers to manufacture more efficiently. It stimulates research. The
1404 consumption of flexible packaging materials including cellophane has grown at a rapid rate. Within these markets the competition is intense. New producers have entered. No one material or one supplier controls—certainly not duPont, which has neither the power to raise prices nor to exclude competitors.

After reviewing the development of this business, plaintiff has been unable to bring a single person who says he was injured or who claims to have been denied an opportunity to participate. Prices have consistently been lowered and reflect competitive pressures. Production has expanded. Benefits from research have been passed on to consumers. DuPont has not conducted its cellophane business in a restrictive way. There are no artificial controls which it can exercise in the markets where its product is sold.

A. DuPont's Position Does Not Violate § 2 of the Sherman Act

The charge here is duPont monopolizes cellophane. The charge involves two questions: 1. does duPont possess monopoly powers; and 2., if so, has it achieved such powers by "monopolizing" within the meaning of the Act and under United States v. Aluminum Company of America, 2 Cir., 148 F. 2d 416, 429. Unless the first is decided against defendant, the second is not reached. First, then, to the question of existence of monopoly power.

1. DuPONT DOES NOT HAVE MONOPOLY POWER

a PLAINTIFF MUST ESTABLISH DUPONT HAS SUFFICIENT POWER ARBITRARILY TO RAISE PRICES OR TO EXCLUDE COMPETITORS.

Ultimate determination of issues raised by a charge § 2 has been violated, involves application of established principles. The tests are clear. They have been laid down in numerous cases.

1405 The issues in this litigation are fact issues, not law issues. When facts are analyzed in the light of established tests, result is clear.

The voluminous record in this case requires the distillation of a great mass of acts which are basic to a decision.

Findings of Fact

I. Description of Defendant duPont

(Findings 1–6)

1

E. I. duPont de Nemours & Co. (hereafter called "duPont") is a Delaware corporation. It manufactures chemical products, including many types of plain and moistureproof cellophane.[27] Prior to 1936, duPont engaged in the manufacture of these products through subsidiary companies; From 1923 to 1929, through duPont Cellophane Company in which duPont had 52% interest, and from 1929 to 1936, through duPont Cellophane Company, Inc., in which duPont had a 100% interest.[28]

2

Within the duPont organization responsibility for the manufacture and sale of cellophane and bands rests with the Film Department which makes and sells other products, such as cellulose acetate film, polyethylene film, cellulose sponges, and cellulose bands.[29] From 1936 until formation of the Film Department in April 1950, cellophane was handled with other products by the Cellophane Division of the Company's Rayon Department.[30] The Cel-O-Seal section of the division handled caps and bands.[31]

3

1406 DuPont built cellophane manufacturing plants and commenced operations in them:

Plant and Location	*Operation Started*
Buffalo #1 (N. Y.)	April 1924.
Old Hickory #1 (Tenn.)	October 1929.
Old Hickory #2 (Tenn.)	August 1930.
Spruance #1 (Richmond, Va.)	November 1930.
Buffalo #2 (N. Y.)	February 1932.
Spruance #2 (Richmond, Va.)	May 1937.
Clinton #1 (Iowa)	March 1941.
Clinton #2 (Iowa)	February 1947.[32]

[27] Answer, Para. 3. GX 1103, p. 1213, 7/2/36.
[28] Carpenter, Tr. 6261–62, 6268–71. GX 1, pp. 5, 8, 2/17/44.
[29] R. R. Smith, Tr. 5663.
[30] Carpenter, Tr. 6265–66.
[31] DX 941, p. 1915, 1/23/45.
[32] Answer, Para. 17.

All plants are operating today except plant known as Buffalo #1 which was closed in 1942 and thereafter converted to manufacture of rayon for tire cord at the request of the United States to meet urgent production problems during the war.[33]

4

DuPont sells types of cellophane designed to serve specific packaging needs.[34] In 1949, duPont sold 108 varieties of cellophane.[35]

5

In 1950, duPont produced 202,000,000 lbs. of cellophane[36] and its sales in that year totalled $99,181,192 of which $89,850,416 was moistureproof cellophane.[37]

6

DuPont sells cellophane in interstate trade.[38] Cellophane is sold in foreign commerce.[39]

1407 II. Description of Cellophane

(Findings 7–12)

7

Plain cellophane is a thin flexible non-fibrous film of regenerated cellulose containing glycerol as a softener. It has little resistance to the passage of moisture vapor and is used for wrapping products as to which the gain of moisture is not important.[40]

Moistureproof cellophane is a different product. It is a thin transparent flexible non-fibrous film of regenerated cellulose containing a softener, one of which is glycerol, combined with a moistureproofing composition. Moistureproof cellophane is used for packaging foodstuffs; gain or loss of moisture is important.[41]

Plain cellophane is manufactured in various thicknesses, colors, as well as transparent form.[42] Types of moistureproof cellophane differ in their resistance to moisture vapor, ability to be sealed by heat and anchoring of the coating to the base film.[43] Specific

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[33] Answer, Para. 17. Yerkes, Tr. 6950. GX 32; pp. 153–61, 8/23/44.
[34] DX 408, pp. 794–808, 10/1/48. Mitchell, Tr. 5504–30.
[35] GX 396, pp. 5491–97, 5/15/50.
[36] DX 537, p. 993, 1951.
[37] DX 536, p. 992, 1951.
[38] Answer, Para. 20.
[39] GX 594, p. 7554, 9/28/48.
[40] GX 9, pp. 71–73, 12/2/38; GX 11, pp. 85–86, 3/27/45; GX 25, pp. 129–31; GX 26, p. 136, 5/21/46.
[41] GX 9, pp. 71–73, 12/2/38; GX 25, pp. 129–32, 7/2/43; GX 26, pp. 136–38, 5/21/46; GX 11, pp. 86–90, 3/27/45; Cook, Tr. 2202–03.
[42] GX 11, p. 85, 3/27/45; GX 396, p. 5490, 5/15/50.
[43] GX 11, pp. 86–90, 3/27/45; GX 396, pp. 5495–97, 5/15/50. Mitchell, Tr. 5481–82.

types of moistureproof cellophane were developed to meet the packaging requirements of specific products.[44]

8

In commercial practice moistureproof cellophane is 100 times as impervious to the transmission of moisture vapor as plain cellophane.[45]

9

Plain cellophane is manufactured by extruding viscose made to specifications through a narrow slot in a hopper into a chemical bath where it coagulate in the form of a thin sheet; this sheet is run through a succession of purifying baths and while wet is immersed in a water solution of glycerol, some of which is absorbed; excess moisture is then removed from the surface of the film and the material is dried to a predetermined moisture content.[46]

1408

Moistureproof cellophane is manufactured by combining with a base thin transparent film of regenerated cellulose, containing a softener, one of which is glycerol, a moistureproofing coating composition, which may comprise waxes, resins, nitrocellulose or other film forming materials and plasticizers.[47]

The manufacturing processes are chemical in nature and require for successful commercial operation a degree of technical knowledge and controls. The mechanical aspects of the operations are intricate.[48]

10

Until the invention and development of moistureproof film, cellophane sales were relatively unimportant.[49]

Production of moistureproof cellophane, which began in 1927, by 1930 had exceeded production of plain cellophane.[50] Subsequent growth of cellophane sales has been due to moistureproof cellophane.[51] In 1936, United States production of plain cellophane amounted to 24,650,000 lbs. and by 1947 had increased to only 25,780,000 lbs. During the same period, United States production of moistureproof cellophane increased from 50,941,000 lbs. to 148,769,000 lbs.[52]

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[44] DX 408, pp. 794–808, 10/1/48. Mitchell, Tr. 5517, 5525.
[45] DX 107, p. 231, 6/29; DX 291, p. 543, 8/5/37 (table). GX 6005, p. 7930.
[46] Answer, Para. 12 GX 9, pp. 71–73, 12/2/38; GX 25, pp. 129–31, 7/2/43; GX 999, pp. 11–14, 10/41.
[47] GX 25, pp. 131–32, 7/2/43; GX 26, pp. 136–38, 5/21/46.
[48] DX 367, p. 686, 11/27/40. GX 594, p. 7552, 9/28/48. Benger, Tr. 5433–36.
[49] Cook, Tr. 2094.
[50] GX 2467, p. 3157, 7/13/33; GX 485, p. 6439, 1/22/31.
[51] GX 395, p. 5488, 5/15/50. Cook, Tr. 2094, 2117–18.
[52] GX 532, p. 2098.

1409

11

After preparation of viscose solution, cellophane is extruded through a casting machine. These machines are 200 feet long and are operated by duPont at speeds up to 120 meters per minute, carrying a film 1/1,000th of an inch thick (300 gauge) from a semi-coagulated to a coagulated condition with an allowable variation in gauge of only 1/10,000th of an inch.[53] DuPont's moistureproof cellophane goes through the further stage of a six story coating tower in which the film running at a speed of 200 meters per minute has applied to it on each side a coating of 1/100,000th of an inch thick, with an allowable tolerance in coating thickness of approximately 1/1,000,000th of an inch.[54]

12

Plain and moistureproof cellophane are separate products from cellulose caps and bands which are made by separate processes, used for different purposes and sold to a different trade.[55]

III. DuPont's Entry into the Cellophane Business and Organization of duPont Cellophane Company

(Findings 13–36)

13

DuPont was the first company to manufacture plain cellophane in the United States,[56] and the first to manufacture moistureproof cellophane anywhere in the world.[57]

14

La Cellophane, Societe Anonyme, referred to as "La Cellophane", is a French corporation with principal place
1410 of business at Paris, France.[58] Prior to 1941 it had association with an organization known as Comptoir des Textiles Artificiels, referred to as "Comptoir", a French organization with interests in rayon.[59] La Cellophane produces cellophane in France.[60] It was the first company to manufacture plain cellophane on a commercial basis, and was engaged in this business in France in 1917.[61]

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[53] McCune, Tr. 5542, 5555–56, 5558–59.
[54] McCune, Tr. 5543, 5567–72.
[55] Cook, Tr. 2202–04. DX 407, pp. 794–808, 10/1/48.
[56] GX 26, p. 136, 5/21/46.
[57] Benger, Tr. 5437–38. GX 28, pp. 142–43, 11/30/45.
[58] Answer, Para. 4.
[59] GX 1, p. 4, 2/17/44.
[60] Goland DX 1015, p. 179.
[61] Answer, Para. 15. GX 28, p. 142, 11/30/45. Ernst, Tr. 5339–41, 5371.

15

Jacques Brandenberger of France invented the process and machinery for the manufacture of plain cellophane about 1912. He obtained patents both in Europe and United States on his inventions. Brandenberger's processes and patents were transferred to La Cellophane on its formation, at which time Brandenberger joined La Cellophane. The United States patents were assigned to duPont Cellophane Company in 1923. Some of these were subsequently used in duPont Cellophane Company's operations.[62]

16

Prior to duPont's decision to manufacture plain cellophane, duPont had been associated with Comptoir in the manufacturing of viscose rayon in the United States through a jointly owned company called duPont Fibersilk Company (later, duPont Rayon Company). This association had been profitable. The processes and technical information, including viscose chemistry, engineering and other details of manufacture of rayon, had been acquired from the Comptoir after fruitless experimentation by duPont to develop an artificial fiber.[63]

17

DuPont management decided to invest money in cellophane manufacture as part of a policy determined after
1411 World War I to diversify into a broad line of chemical products.[64] In entering the cellophane business, duPont had no intention to commit any act violative of the Sherman Act.[65]

18

About 1923, duPont became interested in cellophane when it learned through the Comptoir, La Cellophane had developed and was operating a commercial process for the manufacture of plain cellophane. DuPont conducted negotiations with the French interests for the American rights to this process, which culminated in the formation of duPont Cellophane Company and execution of certain technical agreements.[66] No evidence exists any other concern in the United States was interested in securing the French process at this time.

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[62] GX 26, p. 136, 5/21/46; GX 28, pp. 142–43, 11/30/45; GX 999, p. 4, 10/41. Ernst, Tr. 5340–41.
[63] Carpenter, Tr. 6257–60. GX 1, p. 4, 2/17/44.
[64] Carpenter, Tr. 6257, 6275. Yerkes, Tr. 6938–39.
[65] Carpenter, Tr. 6276–83. Yerkes, Tr. 6940–57.
[66] GX 1, pp. 4–8, 2/17/44; GX 28, pp. 142–43, 11/30/45. Carpenter, Tr. 6257–61.

19

The French would not disclose any aspect of their cellophane process to duPont unless duPont would agree to refrain from manufacturing cellophane for five years in the event it determined after disclosure not to take a license.[67]

20

The French were not willing to make their process available to duPont unless duPont agreed the French could participate in the profits of United States manufacture[68] and unless duPont was willing to confine to North and Central America its manufacture and sale of cellophane made by the French process.[69] Du-
1412 Pont sought to obtain exclusive rights to La Cellophane's patents and processes and responsibility for the manufacturing operations.[70]

21

By contract dated June 9, 1923, duPont and the French agreed to form duPont Cellophane Company to manufacture cellophane in the United States. Each party agreed it would not prior to December 31, 1935 except by duPont Cellophane Company become interested in any other business in North or Central America engaged in the manufacture of cellophane.[71]

22

By agreement of June 9, 1923, duPont Cellophane Company was organized to manufacture cellophane in the United States. DuPont contributed $866,666,67 and received 52% of the voting stock. La Cellophane contributed its patents, processes, technical assistance, and $133,333.33, for all of which it received 48% of the voting stock.[72]

23

The contribution of La Cellophane to duPont Cellophane Company in exchange for 48% of its voting stock was neither cash nor patents but its secret process and technical assistance.[73]

24

On December 26, 1923, an agreement was executed between duPont Cellophane Company and La Cellophane by which La Cello-

[67] GX 1458, p. 6001, 1/23; GX 392, p. 5429, 4/1/23.
[68] Carpenter, Tr. 6262; GX 1459, p. 6009, 11/29/22.
[69] Carpenter, Tr. 6264–65; DX 738, p. 1571, 10/15/23; DX 741, p. 1575, 8/25/23.
[70] Carpenter, Tr. 6264.
[71] GX 1001, pp. 986–87, 993–94, 6/9/23.
[72] GX 1001, p. 987, 6/9/23. Carpenter, Tr. 6261–62.
[73] DX 735, p. 1568; GX 402, pp. 5579–80, 5/15/50. GX 392, 545–55, 4/14/23.

phane licensed duPont Cellophane Company exclusively under its United States cellophane patents, and granted duPont Cellophane Company the exclusive right to make and sell in North and Central America under La Cellophane's secret processes
1413 for cellophane manufacture. DuPont Cellophane Company granted to La Cellophane exclusive rights for the rest of the world under any cellophane patents or processes duPont Cellophane Company might develop.[74]

25

There was no agreement between La Cellophane and duPont beyond the written agreements of June 9, 1923 and December 26, 1923.[75]

26

La Cellophane had four representatives on the Board of eleven (later nine) Directors of duPont Cellophane Company.[76] La Cellophane had a minority interest and veto power over major expenditures, over obligations of the company which would alienate, mortgage or diminish the corporate assets, and over changes in the number of Directors. Similar veto powers were held by the minority over changes in the charter and by-laws.[77]

27

The representatives of La Cellophane on the Board of duPont Cellophane Company attended Directors' meetings and participated in the functions of the Board.[78] The French were most actively represented by a New York lawyer, Benjamin Paskus, and two American businessmen, Messrs. Henry Blum and Albert Blum.[79]

28

In 1929 duPont purchased the shares of the French in duPont Cellophane Company, and reorganized it as duPont Cellophane Company, Inc. In exchange for the French shareholding
1414 in the duPont Rayon Cellophane Companies the French interests received duPont Company stock with a market value at that time of nearly $90,000,000. French interests continued their membership on the Board of duPont Cellophane Company, Inc., maintained their previous degrees of participation in the management of the affairs of the company, and technical

[74] GX 1002, pp. 998–1001, 12/26/23.
[75] Carpenter, Tr. 6264–65. Yerkes, Tr. 6921.
[76] DX 734, p. 1566; DX 732, pp. 1543–45, 4/4/26.
[77] GX 1458, pp. 6095–96, 12/26/23; GX 1001, pp. 994–96, 6/9/23; DX 732, pp. 1537–39, 6/20/23. Carpenter, Tr. 6262–63.
[78] Carpenter, Tr. 6266–68. Yerkes, Tr. 6917–18.
[79] Carpenter, Tr. 6266–68. Yerkes, Tr. 6916–17.

cooperation continued between duPont Cellophane Company, Inc. and La Cellophane.[80]

29

At the time duPont decided to enter the cellophane business it had limited technical resources useful in such business, and had no knowledge as to how to make cellophane or of the chemistry of the product.[81] It was not staffed to develop the necessary chemical and engineering techniques at a cost which would have been reasonable.[82] This information was essential to commercial manufacture of plain cellophane.[83]

30

Although duPont believed it was a business risk to undertake manufacture of cellophane in the United States, success of the venture was not assured.[84] The buildings for the initial casting machines at Buffalo were designed to permit conversion to use in rayon manufacture in the event the cellophane venture failed.[85]

31

In France plain cellophane was sold in sheet form for hand application in the packing of luxury items, such as perfume bottles and for decorative uses. It was sold in small volume at high
1415 prices.[86] DuPont felt while the business risks were substantial, it stood a chance of promoting cellophane in the United States by improving its quality and manufacturing processes so it could be sold for mass packaging uses at lower cost in competition with other flexible packaging materials already established in the American market.[87]

32

Evidence shows duPont could not have developed a successful process for cellophane manufacture in less than five to eight years and then only at very substantial cost.[88]

DuPont has continued to use La Cellophane's basic process,[89] and evidence shows the only other process commercially developed for continuous manufacture, Wolff's casting on a wheel, was inferior in cost of manufacture and quality of product.[90]

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[80] GX 1003, p. 1004–06, 3/18/29. DX 734, p. 1566; DX 735, p. 1568. Carpenter, Tr. 6268–71.
[81] Yerkes, Tr. 6919. Benger, Tr. 5417–18.
[82] Benger, Tr. 5435.
[83] Yerkes, Tr. 6919. Ernst, Tr. 5352, 5354. Benger, Tr. 5424.
[84] GX 392, pp. 5428–74, 4/1/23.
[85] Ernst, Tr. 5345.
[86] GX 28, pp. 142–43, 11/30/45; GX 392, p. 5439, 4/1/23. Yerkes, Tr. 6938–39.
[87] GX 392, p. 5439, 4/1/23. Yerkes, Tr. 6938–39.
[88] Benger, Tr. 5424–25.
[89] McCune, Tr. 5549. Ernst, Tr. 5363–64.
[90] Olsen, Tr. 6812–13. DX 504, p. 943, 11/19/24; DX 508, p. 949, 5/4/27; DX 512, p. 957, 1/21/29; DX 513, p. 958, 2/23/29; DX 514, p. 959, 5/31/29. GX 1455, p. 1947, 9/11/30.

33

Technical information which La Cellophane granted duPont Cellophane Company represented the entire knowledge gained by La Cellophane as the result of years of research in developing the process. It included designs for all machinery including the hopper and all casting machine apparatus, together with information as to chemical compositions and controls from the initial step in the formulation of the viscose solution to the ultimate product. The French disclosed through plant inspection, manuals and training of personnel both in France and in the United States all phases of their own proven production line knowhow. French technicians designed the initial duPont Cellophane plant, manufactured some of the machinery in France, and supervised the operations and training of essential personnel.[91]

1416

34

Communication of the process to duPont by La Cellophane was in confidence. The process for cellophane manufacture had been kept in secrecy by the French prior to its communication to duPont by a system of fences, plant guards, passes and an effort on the part of management to maintain secrecy. Following the communication of the process to duPont Cellophane Company, both it and La Cellophane used similar means to maintain secrecy of the process and the interior of the plants.[92]

35

Some information as to La Cellophane's process became available through the patent literature,[93] but many key facts were not disclosed at any time prior to World War II and all phases of the process were kept secret by duPont until that time.[94]

36

DuPont still employs the fundamentals of the secret process received from La Cellophane for continuous casting of an endless sheet of regenerated cellulose.[95]

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[91] Ernst, Tr. 5339–64. DX 742, p. 1579, 9/29/23; DXs 743–757, pp. 1580–1613.
[92] Yerkes, Tr. 6919–20. Benger, Tr. 5421–23. Ernst, Tr. 5352, 5365, 5377.
[93] GX 2014, p. 2070, 2/4/46; GX 1329, p. 1685, 4/6/44.
[94] GX 4449, p. 6214, 1/23/40; GX 1329, p. 1684, 3/29/44; GX 2014, p. 2070, 2/4/46. Ernst, Tr. 5377. Yerkes, Tr. 6922.
[95] McCune, Tr. 5608–09. DX 369, p. 689.

IV. The "Market Setting" in Which Cellophane is Sold

(Findings 37–79)

37

The relevant market for determining the extent of duPont's market control is the market for flexible packaging
1417 materials (judicial notice after examination and observation).

38

Both plain and moistureproof cellophane are packaging materials.[96] Only 6 percent of duPont's cellophane production is sold or used for non-packaging purposes.[97]

39

When cellophane was first made by duPont, wax paper, glassine, and sulphite paper were the flexible packaging materials in use. These products were established in the trade and accepted.[98] They remain today dominant materials sold for the end uses where cellophane is also employed by some packagers.[99]

40

Since 1923 new types of flexible materials have been developed for packaging. These include, among others, rubber hydrochloride film,[100] moistureproof cellophane,[101] polyethylene coated paper,[102] heat sealing glassine,[103] and polyethylene film.[104]

41

From the beginning of duPont's cellophane duPont has been aware of competition of other flexible packaging materials, particularly waxed paper and glassine, and has directed its price and sales policies toward selling successfully against these
1418 materials. This awareness is reflected from 1923 to the filing of this suit in correspondence and reports within the duPont organization.[105]

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[96] R. R. Smith, Tr. 5665. DX 409, p. 809, 2/9/50.
[97] R. R. Smith, Tr. 5665. DX 409, p. 809, 2/9/50.
[98] DX 982. Nelson, DX 1020, p. 301. Ramsay, DX 1017, p. 226.
[99] DXs 989–992. Ramsey, DX 1017, p. 226.
[100] DX 297, p. 568, 1947. GX 583 (Imp. Doc. No. 39), pp. 28–29, 31, 5/16/49. Ellies, DX 1014, p. 134.
[101] GX 532, p. 2098.
[102] Croy, DX 1021, pp. 341, 344.
[103] Nelson, DX 1020, p. 316.
[104] GX 583 (Imp. Doc. No. 39), pp. 3–4, 10, 27, 31, 5/16/49. Leeds, DX 1011, p. 92.
[105] GX 392, p. 2429, 4/14/23; GX 1483, p. 7048, 4/23/26; GX 5047, p. 4558, 4/28/41; DX 298, p. 570, 8/13/24; DX 299, p. 571, 8/19/24; DXs 304–326, pp. 585, 632; DXs 328, 334, pp. 634–40.

42

Since 1923 there has been a growth in the use of flexible packaging materials; measured in millions of square yards, total United States production and imports of the principal flexible packaging materials has grown from approximately 4,170,000 in 1925 to 14,720,000 in 1949.[106] This has resulted from improvements in all the materials themselves; the rapid development of self-service distribution with its emphasis upon retail packaging units, higher standards of living and increased consumption, emphasis upon protective and other health aspects of packaging, the development of new merchandising techniques and the increased utility of the materials themselves.[107] All principal flexible packaging materials have shared in this development and much of the growth of duPont's cellophane business is due to the factors mentioned.[108]

43

There is tremendous increase in packaging since the end of World War II in both transparent and non-transparent materials. Most of this increase has been in consumer-sized packages.[109]

44

Dupont employs sixty men in the selling of cellophane.[110]
1419 These men are trained to have technical familiarity with packaging design, with packaging machinery, including printing and bag making machines, with physical and chemical properties of the various types of cellophane, and with the distribution, costs, sales promotion and other business problems of concerns that are direct users of cellophane and of concerns that process it for resale.[111]

45

DuPont sells about 55% of its cellophane direct through its own salesmen to users who package products of their own manufacture for retail distribution such as bakers, food chains, candy manufacturers, meat packers, cereal manufacturers, and tobacco companies.[112] This cellophane is sold without printing or other processing in roll or sheet form in various sizes to suit the cus-

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[106] Ramsay, DX 1017, pp. 233–34. Leeds, DX 1011, pp. 93–94. McCurry, DX 1016, p. 222. Tindal, DX 1012, p. 107. DX 981. DX 982.

[107] GX 6002, p. 8116, 6/8/51. Martin, Tr. 6380–82. McCurry, DX 1016, pp. 218–19. Elmstrom, DX 1019, p. 290. Croy, DX 1021, pp. 343–44.

[108] DX 981; DX 982. Leeds, DX 1011, pp. 93–94; Nelson, DX 1020, p. 326. Tindal, DX 1012, p. 107.

[109] Leeds, DX 1011, pp. 93–94. Tindal, DX 1012, p. 119. McCurry, DX 1016, pp. 214, 218–19, 222. Ramsay, DX 1017, pp. 233, 234. Elmstrom, DX 1019, p. 290. Nelson, DX 1020, p. 326. Croy, DX 1021, pp. 343–44. GX 6002, pp. 8116–21, 6/8/51.

[110] R. R. Smith, Tr. 5661.

[111] R. R. Smith, Tr. 5662–63.

[112] R. R. Smith, Tr. 5665–67; DX 409, p. 809, 2/9/50; DX 595, pp. 1149–50, 1949.

tomer's needs.[113] Most customers run cellophane through packaging machines to wrap their products.[114]

46

DuPont sells cellophane to converters who print cellophane or process it into packaging units such as bags or special wraps and in turn sell in a form for use as a primary part of a package to concerns which package their products.[115] About 35% to 40% of duPont cellophane is sold in this manner.[116] The same customer often buys unprinted cellophane from duDont for certain purposes and buys converted cellophane from converters for other or the same purposes.[117]

DuPont sells cellophane in quantities to jobbers and to fabricators.[118] The latter use cellophane in the manufacture of
1420 non-packaging items such as straws, pressure-sensitive cellulose tape, Christmas ornaments and ribbon.[119]

47

Most companies engaged in converting cellophane into bags or printed packaging material, including all of the principal converters of duPont cellophane also convert other flexible packaging materials, such as glassine, other papers, Pliofilm, polyethylene, Saran, and others.[120] The products of such a converter made of flexible packaging materials other than cellophane are sold by the same salesmen who sell the converter's products made of cellophane, to customers who are potential users of converted cellophane as well.[121]

48

Most converters who handle duPont cellophane also handle other flexible packaging materials at the same time for sale for the same end uses.[122]

49

Converters produce wrappers for nearly every type of customer.[123] Converters hold themselves out to the public through

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[113] R. R. Smith, Tr. 5668.
[114] R. R. Smith, Tr. 5666, 5668. Tindal, DX 1012, pp. 104–05.
[115] GX 5457, p. 5342, 9/10/45.
[116] DX 409, p. 809, 2/9/50. GX 6002, pp. 8128–29, 6/8/51.
[117] E. g., Elmstrom, DX 1019, pp. 282, 284.
[118] DX 409, p. 809, 2/9/50; DX 595, pp. 1149–50, 1949.
[119] GX 5457, p. 5342, 9/10/45.
[120] Martin, Tr. 6334. Goland, DX 1015, p. 184. Ramsay, DX 1017, pp. 225, 228–29. Hanson, DX 1018, pp. 248–51. Leeds, DX 1011, p. 79. DX 988.
[121] Martin, Tr. 6363. Goland, DX 1015, p. 198. Hanson, DX 1018, p. 255. Ramsay, DX 1017, p. 245. Leeds, DX 1011, p. 89.
[122] DX 988. Martin, Tr. 6334. Hanson, DX 1018, pp. 248–51. Ramsay, DX 1017, pp. 228–29. Goland, DX 1015, p. 184.
[123] Martin, Tr. 6336–38.

advertising in trade journals, as ready to serve any type of customer with any type of flexible packaging material or combination.[124]

50

Concerns which purchase cellophane from duPont, or converted duPont cellophane from converters, will purchase
1421 other packaging materials (such as glassine, foil, etc.) from manufacturers of such materials and from converters of them.[125]

51

In addition to duPont two companies, American Viscose Corporation and Olin Industries, Inc., also manufacture and sell cellophane throughout the United States and in foreign commerce.[126]

52

Sylvania Industrial Corporation was a Virginia corporation[127] organized in 1929 and began production of cellophane at a plant in Fredericksburg, Virginia in 1930.[128] In 1946 it was acquired by American Viscose Company, a Delaware corporation, which is the largest producer of viscose and of viscose rayon in the United States,[129] with assets in 1949 in excess of $222,000,000.[130] The term "Sylvania" is used with reference to events since that acquisition as meaning the Sylvania Division of the American Viscose Company, and prior thereto to mean Sylvania Industrial Corporation.

53

Olin Industries, Inc., referred to as "Olin", is a Delaware
1422 corporation having a place of business at East Alton, Illinois.[131] Ecusta Paper Corporation is a Delaware corporation having its principal place of business at Pisgah Forest, North Carolina.[132] Ecusta is owned and controlled by Olin and carries on the entire cellophane business of Olin.[133] Ecusta began pro-

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[124] Martin, Tr. 6454, 55. Hanson, DX 1018, pp. 254–56. Croy, DX 1021, p. 346. Ramsay, DX 1017, p. 245. DX 239, p. 472; DX 257, p. 491; DX 264, p. 498; DX 271, p. 505; DX 280, p. 514; DX 281, p. 515; DX 284, p. 518; DX 286, p. 522.

[125] Jakes, DX 1006, p. 10; Hopping, DX 1007, pp. 19, 21; Southwick, DX 1008, pp. 30, 32; Torrence, DX 1009, p. 43; Horn, DX 1010, pp. 69–70; Leeds, DX 1011, pp. 79–80, 87–88; Tindal, DX 1012, pp. 105–06; Wilcox, DX 1013, pp. 125–26; Ellies, DX 1014, pp. 142–43, 145; Goland, DX 1015, p. 184; McCurry, DX 1016, pp. 205–06, 213, 219; Ramsay, DX 1017, pp. 225, 228–30; Hanson, DX 1018, pp. 248, 250, 253–54; Nelson, DX 1020, pp. 303–04; Croy, DX 1021, pp. 339–40, 342.

[126] Reichel, Tr. 6019, 6044. Olsen, Tr. 6809, 6830. DX 600, p. 1216. GX 580, pp. 7331–32, 8/8/50.

[127] Answer, Para. 18.

[128] Answer, Para. 18. Reichel, Tr. 6024–32. GX 434, p. 5723, 1/25/30; GX 436, p. 5743, 1/7/31.

[129] Answer, Para. 18.

[130] DX 983 (Moody's Industrials, 1950).

[131] DX 974, p. 1985, 11/4/49.

[132] DX 976, p. 2005, 3/6/50.

[133] DX 976, p. 2005, 3/6/50; DX 978, p. 2008, 1951.

duction of cellophane in June 1951 at its plant in Pisgah Forest, North Carolina.[134]

54

Manufacturers of flexible packaging materials other than cellophane promote their products by many of the means employed by duPont to promote cellophane.[135]

55

Manufacturers of flexible packaging materials hold themselves out to the trade, through advertising as able to satisfy the packaging requirements of the principal customer trades. This advertising material appears in the principal packaging periodicals as Modern Packaging, Package Parade, and the Modern Packaging Encyclopedia and in trade journals representing various end uses, such as Bakers Weekly, The Confectioner's Journal, Food Industries National Provisioner; etc. These advertising appeals constitute claims each material, including cellophane, has the desirable degree of protective property (against moisture, dirt, rough handling, etc.) consumer appeal and reasonable price to act as an economical merchandising medium and protective package for food and other products.[136]

1423 56

For any specific end use there is available a variety of flexible packaging materials that will satisfy the requirements of packaging a product. A number of materials can provide the combination of properties. It is solved by choosing combination of qualities and price which is considered most profitable to the purchasing concern at the time of the particular purchase. Persons who use cellophane for packaging a product regard cellophane as only one of several possible packages and often change to others on short notice.[137]

57

A customer for packaging materials is in the market for additional packaging material within a few weeks. All such customers are open to change from one packaging material to another at any time.[138]

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[134] DX 978, p. 2008, 1951. Olsen, Tr. 6829.

[135] Hopping, DX 1007, pp. 19–22. Torrence, DX 1009, pp. 42–44. Leeds, DX 1011, pp. 86–87. Tindal, DX 1012, p. 111. Ellies, DX 1014, pp. 138–39, 141–43. McCurry, DX 1016, p. 221. Ramsay, DX 1017, pp. 236, 245. Elmstrom, DX 1019, p. 285. Nelson, DX 1020, pp. 323, 324.

[136] Hanson, DX 1018, pp. 254–55. DXs 231–288, pp. 464–524.

[137] Southwick, DX 1008, p. 31. Horn, DX 1010, pp. 68–69, 75–76. Ellies, DX 1014, pp. 154–55. McCurry, DX 1016, pp. 209, 211–12, 222. Ramsay, DX 1017, pp. 230–31. Hanson, DX 1018, pp. 253–55. Elmstrom, DX 1019, pp. 279–80. Nelson, DX 1020, pp. 305–06. Leeds, DX 1011, p. 97. Martin, Tr. 6349–50.

[138] Leinbach, Tr. 6805–06. Russell, Tr. 6471–72. Martin, Tr. 6355–58. GX 583 (Imp. Doc. No. 39), p. 32.

58

Cellophane is not a unique flexible packaging material in any functional or economic sense. In terms of uses for which cellophane is sold, and the qualities it brings to each use as a wrapping material, cellophane is interchangeable and in fact continually interchanged with many flexible packaging materials.[139]

[139] Jakes, DX 1006, pp. 1–5, 13–16. Hopping, DX 1007, pp. 19–23. Southwick, DX 1008, p. 31. DX 1008A, p. 35. Torrence, DX 1009, pp. 42–47. Horn, DX 1010, pp. 68–73, 75–77. Leeds, DX 1011, pp. 89–92, 97, 100–01. Tindal, DX 1012, pp. 105–09, 112–19. Wilcox, DX 1013, pp. 121–30. Ellies, DX 1014, pp. 136–39, 143–56. Goland, DX 1015, pp. 181, 190–97. McCurry, DX 1016, pp. 207–12, 221–24. Ramsay, DX 1017, pp. 228–44. Hanson, DX 1018, pp. 248–54, 256. Elmstrom, DX 1019, pp. 271–82, 285–87. DX 1019–B, pp. 295–99, 8/14/51. Nelson, DX 1020, pp. 304–23. Croy, DX 1021, 339–45.

The accompanying Table [140] compares, descriptively, physical properties of cellophane and other flexible packaging materials:

Physical properties											
Packaging materials	Heat sealability	Printability	Clarity	Tear strength (Elmendorf)	Bursting strength	Water absorption in 24 hours immersion	Moisture permeability	Permeability to gases [2]	Dimens. change with humid diff.	Resistance to grease and oils	Wrapping machine running qualities
Cellophane (plain)	Yes (if coated).	Yes	Highly transparent.	Low	High	High	High	Very low	Large	Excellent	O. K.
Cellophane (moisture-proof).	Yes (if coated).	Yes	Highly transparent.	Low	High	High	Low-medium	Very low	Large	Excellent	O. K.
Plain grease-proof paper.	No	Yes	Opaque	Good	Low	High	High	Medium	Moderate	Good	O. K.
Plain glassine	No	Yes	Commercially transparent to opaque.	Good	Low	High	High	Low	Moderate	Good	O. K.
Lacquered glassine	Yes	Yes	Commercially transparent to translucent.	Good	Low	Low	Low-medium	Low	Moderate	Good	O. K.
Waxed glassine	Yes	(1)	Commercially transparent to translucent.	Good	Low	Low	Low	Low	Moderate	Good	O. K.

Vegetable parchment.	No	Yes	Tends to be opaque	Good	Good	High	High	Low	Moderate	Good	O. K.
Waxed paper (18 lbs. or over).	Yes	(1)	Commercially transparent.	High	Good	Low	Low-medium	High	Moderate	None	O. K.
Aluminum foil	No	Yes	Opaque	Low	Low	Nil	Very low	Very low	None	Excellent	O. K.
Aluminum foil (heat sealing).	Yes	Yes	Opaque	Low	Low	Nil	Nearly nil	Very low	None	Excellent	O. K.
Cellulose acetate	Yes	Yes	Highly transparent.	Low	High	Low	High	Variable	Very small	Excellent	O. K.
Pliofilm (rubber hydrochloride).	Yes [3]	Yes [3]	Highly transparent with slight haze.	Medium	High	Low	Medium	Low	Very small	Excellent	Good [3]
Saran (vinylidene chloride).	Yes [3]	Yes [3]	Highly transparent.	High	High	Low	Very low	Very low	None	Excellent	Poor [3]
Polyethylene	Yes [3]	Yes [3]	Transparent with slight haze.	High	High	Low	Medium	High	None	(4)	Poor [3]
Cry-O-Rap	Yes [3]	Yes [3]	Transparent with slight haze.	High	High	Low	Medium	Low	None	Excellent	Poor [3]
Sulphite (high finish wrapper and label paper).	No	Yes	Opaque	High	Medium	High	Very high	High	Moderate	None	O. K.

REFERENCES

[1] Normally printed before waxing.

[2] The permeability to gases can vary greatly depending upon the gas and the humidity conditions. The levels indicated in this chart apply particularly to flavor type volatiles as found in many food products.

[3] Plastic films may require special heat sealing techniques, and printing processes or special machines.

[4] Not affected by greases but penetrated by some oils.

[5] The information on this chart is based upon the generally accepted properties of the materials listed; however, materials produced by different processes, formulations, coatings, raw materials, surface treatments, and thicknesses can show considerable variation from the properties indicated.

[49] IIX 1008-A, p. 35

60

1425 Users and converters of these flexible packaging materials purchase materials principally on the basis of two criteria: (a) the composite of physical properties of a particular material, and (b) the price, or cost of using, a particular material. Neither price alone nor a single quality governs selection.[141]

61

Different purchasers of flexible packaging materials make different appraisals of the composite of properties and the importance of cost, and make widely varied selections of materials.[142]

62

Other flexible packaging materials are sold to the same customers who buy cellophane from duPont and for the same uses.[143] These materials include without limitation:

Aluminum foil is a thin aluminum sheet. The gauges used for packaging are from .0015 to .00035 inches. The foil is used as a packaging medium. It is laminated to glassine, paper or tissue, to other films, or to cellophane. It is opaque, brilliant of surface, highly moistureproof, and readily takes a semi-permanent set, known as "dead folding". It can be printed and like cellophane can be sealed by heat when coated.[144]

1426 Cellulose acetate is a film made by the flowing of a solvent solution of cellulose acetate onto a large diameter, slow moving casting wheel, or metal belt. The solvent evaporates, and the dry film is stripped from the wheel or belt as it turns. The film can be made by an extrusion process. It is waterproof. It can be printed, and sealed by heat, if coated. It has a high surface gloss.[145]

Cry-O-Rap is the trade name of a film made from a modified polyvinylidene chloride resin. Its chief characteristics are chemical inertness, transparency, durability, and flexibility at low temperatures. It can be shrunk around irregularly shaped objects by application of moderate heat.[146]

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[141] Leinbach, Tr. 6774–75. Jakes, DX 1006, 13–15. Horn, DX 1010, pp. 68–69. McCurry, DX 1016, p. 211. Ramsay, DX 1017, pp. 230–31. Hanson, DX 1018, p. 256.

[142] Leinbach, Tr. 6790. Ramsay, DX 1017, p. 231.

[143] Martin, Tr. 6334. DXs 984, 986, 988–93. Jakes, DX 1006, pp. 3, 13. Hopping, DX 1007, pp. 19–21. Torrence, DX 1009, pp. 42–43. Horn, DX 1010, pp. 69–73. Leeds, DX 1011, pp. 89–97. Wilcox, DX 1013, pp. 121–23. Ellies, DX 1014, pp. 135–38, 143. Ramsay, DX 1017, pp. 228–30, 237–42. McCurry, DX 1016, pp. 206–10. Hanson, DX 1018, pp. 248–51, 253–54. DX 1019–B, pp. 295–96. Nelson, DX 1020, pp. 305–06, 310–13.

[144] DX 1008–B, p. 37; DX 289, pp. 533–34, 1/30; DX 292, pp. 545–48.

[145] DX 1008–B, p. 37; DX 291, p. 543, 8/5/37.

[146] DX 1008–B, p. 37.

Greaseproof paper is made by beating wood pulp in a vat filled with water until the fibers become saturated and gelatinous in texture. Resulting product is translucent and resistant to oil and grease.[147]

Glassine is produced by finishing greaseproof paper between highly polished metal rollers under heat and at pressure. This process develops the transparency and surface gloss which are characteristic of glassine. It is greaseproof, and can be sealed by heat, if coated. It is made moistureproof by coating and with appropriate lacquers of waxes and may be printed.

Glassine and waxed paper are the two materials which have been sold in the largest quantities in direct competition with cellophane for the longest period of time.[148]

Pliofilm is a trade name of a film produced by flowing a solvent solution of rubber hydrochloride onto a moving web. The web passes through a heated chamber, which evaporates the solvent and leaves a transparent film. Pliofilm is tough, can be stretched to 5 or 6 times its original dimensions. It is moistureproof, and is capable of weld-type heat sealing. Heavier gauges are
1427 cloudy. It can be shrunk around an object by application of modern heat, and can be printed.[149]

Polyethylene film is made from a solution formed from high-pressure polymerization of ethylene gas. This solution can be cast or extruded to produce the film. Principal characteristics of the film are chemical inertness, flexibility at low temperatures, and good inherent moistureproofness. Polyethylene film is transparent, but slightly hazy.[150]

Saran is the trade name of a film made from polyvinylidene chloride. It is characterized by strength, toughness, flexibility, transparency, and chemical inertness. It has the highest moistureproofness of all the packaging materials.[151]

Sulphite Paper is high grade, machine-glazed paper used as wrapping, for the packaging of food and other merchandise. It is the usual basis of wrappers (e. g. paper component of cigarette pack), waxing stock (for waxed paper) and other uses where moderate strength, flexibility and good coating and printing surface is required.[152]

Vegetable Parchment is made by passing unsized raw paper through a sulphuric acid bath, and drying on regular paper machine dryers. This "parchmentizing" covers the paper with

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[147] DX 1008–B, p. 38. GX 6004, p. 7924. DX 294, p. 556, 11/45; DX 296, pp. 562–66, 1947.

[148] DX 1008–B, p. 38. GX 6004, p. 7924. DX 289, pp. 526–28, 1/30; DX 291, p. 543, 8/5/37; DX 294, pp. 555–58, 11/45; DX 296, pp. 562–66, 1947; DX 297, p. 568, 1947.

[149] DX 1008–B, p. 38; DX 297, p. 568, 1947.

[150] DX 1008–B, pp. 38–39.

[151] DX 1008–B, p. 39.

[152] DX 1008–B, p. 39.

a thin layer of gelatinous cellulose which fills the interstices of the fibres and cements them into a cohesive mass. Vegetable parchment is highly greaseproof, has wet strength, and is slightly translucent.[153]

Waxed Paper is made by applying melted wax to sulphite or sulphate paper. Waxed paper is made in various degrees of transparency, and is sealable by heat. Resins are added to
1428 the wax to enhance surface gloss, heat-sealing properties and low-temperature flexibility. In the printed forms, print is usually applied prior to waxing.[154]

63

There are respects in which other flexible packaging materials are as satisfactory as cellophane:

Waxed Paper—for an instance

Transparency is not necessarily desirable in a wrap,[155] although waxed papers can be made with a degree of transparency.[156]

Waxed paper wraps have eye appeal arrived at through gloss, opacity, and colored printing.[157]

Waxed paper is not difficult to heat-seal, and is as good as cellophane, in this respect.[158]

Waxed paper runs on high speed machines as well as cellophane.[159]

Better printing effects are available with waxed paper than with cellophane.[160]

Waxed paper affords as good moisture protection as cellophane.[161]

Moistureproof coating of moistureproof cellophane will separate more readily in contact with fats and oils than waxed paper coatings.[162]

Waxed paper is cheaper than cellophane.[163]

Waxed paper is superior to cellophane in resistance to rancidity-inducing ultraviolet rays.[164]

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[153] DX 1008–B, p. 39; DX 289, pp. 529–30, 1/30; DX 293, pp. 549–54, 5/44; DX 297, pp. 568–69, 1947.
[154] DX 1008–B, p. 40; DX 289, pp. 526–28, 1/30; DX 295, pp. 559–61, 1947; DX 297, p. 569, 1947.
[155] Martin, Tr. 6436–37. DX 339, p. 646, 4/23/26.
[156] Leinbach, Tr. 6787. DX 70, p. 153; DX 290, p. 536; DX 1005.
[157] Leinbach, Tr. 6752. Ramsay, DX 1017, pp. 232, 243. Hanson, DX 1018, pp. 253–54; Croy, DX 1021, pp. 341, 344. DX 119, p. 265, 4/21/48.
[158] Mitchell, Tr. 5531. Tindal, DX 1012, pp. 106–08. Ramsay, DX 1017, p. 237. Croy, DX 1021, pp. 341, 344. DX 123, p. 271, 1/21/49. DX 1008–A.
[159] Croy, DX 1021, p. 341. Tindal, DX 1012, p. 117. DX 125, p. 273, 1/21/49; DX 127, p. 275, 4/28/49.
[160] DX 119, p. 265, 4/21/48.
[161] Mitchell, Tr. 5531. Tindal, DX 1012, p. 107. Hanson, DX 1018, p. 252.
[162] DX 12, p. 15, 10/25/27; DX 14, p. 18, 9/28/28.
[163] DX 994; DX 995.
[164] DX 151, p. 322, 12/13/48.

1429 Waxed paper is superior to cellophane in durability under rough handling, at low temperatures.[165]

Printing is applied to waxing papers prior to coating.[166]

Glassine

Glassine is, in some types, about 90% transparent, so printing is legible through it.[167]

Glassine affords low cost transparency.[168]

Moisture protection afforded by waxed or lacquered glassine is as good as that of moistureproof cellophane.[169]

Glassine has greater resistance to tearing and breakage than cellophane.[170]

Glassine runs on packaging machinery with ease equal to that of cellophane.[171]

Glassine can be printed faster than cellophane, and can be run faster than moistureproof cellophane on bag machines.[172]

Glassine has greater resistance than cellophane to rancidity-inducing ultraviolet rays.[173]

Glassine has dimensional stability superior to cellophane.[174]

Glassine is more durable in cold weather than cellophane.[175]

Printed glassine can be sold against cellophane on the basis of appearance.[176]

Glassine may be more easily laminated than cellophane.[177]

1430 Glassine is cheaper than cellophane in some types, comparable in others.[178]

Aluminum Foil

Aluminum foil is most commonly used in .00035 gauge which is comparable to cellophane.[179]

In .00035 gauge aluminum foil is cheaper than moistureproof cellophane in cents per 1,000 sq. in.[180]

Aluminum foil after laminating and coating is within competitive range of the price of moistureproof cellophane.[181]

Moisture resistance of coated aluminum foil, even in .00035

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[165] DX 122, p. 269, 12/23/48.
[166] Croy, DX 1021, p. 340.
[167] Leinbach, Tr. 6738–39. DX 53, p. 125, 10/11/40; DX 290, p. 536.
[168] Leinbach, Tr. 6738–39. DX 1005; GX 6004, p. 7920.
[169] Leinbach, Tr. 6750–51. Nelson, DX 1020, pp. 306, 323. DX 47, p. 84, 5/27/38; DX 78, p. 175, 6/18/34; DX 193, p. 385, 7/18/34; DX 1008–A.
[170] Leinbach, Tr. 6804. DX 223, p. 454, 11/10/49; DX 1008–A.
[171] Tindal, DX 1012, pp. 107, 117.
[172] Leinbach, Tr. 6750.
[173] Leinbach, Tr. 6751. Martin, Tr. 6391–93. DX 151, p. 322, 12/13/48.
[174] DX 1008–A.
[175] Nelson, DX 1020, pp. 313–14.
[176] Nelson, DX 1020, p. 322.
[177] Leinbach, Tr. 6572.
[178] Leinbach, Tr. 6749. DX 994. DX 995.
[179] Torrence, DX 1009, p. 44. Hanson, DX 1018, p. 252.
[180] DX 995.
[181] DX 1009, p. 45.

gauge, is comparable with moistureproof cellophane, and is one of the selling points for aluminum foil.[182]

Heat-sealing foil gives a heat-seal comparable with cellophane.[183]

Aluminum foil has dimensional stability in the presence of humidity changes, and offers protection against water absorption. Cellophane is susceptible to water absorption and dimensional change.[184]

Aluminum foil has a degree of eye appeal, and can be attractively printed.[185]

Foil has a dead-folding property which cellophane lacks, which enables foil to give more complete protection to the contents of a package.[186]

Aluminum foil, being opaque, is superior to cellophane in resistance to rancidity-inducing ultraviolet rays.[187]

1431 Cellulose Acetate[188]

There is no evidence the water-insensitivity of CA is a disadvantage. This feature is the basis of CA's superior shrink resistance and dimentional stability.[189]

CA is less susceptible than cellophane to softening by water, and is a superior wrap for fresh produce.[190]

CA permits free passage of moisture and gases more readily than cellophane, and is a superior wrap for fresh produce, fruit, iced cakes and doughnuts, and pies.[191]

CA is made in heat-sealing type, selling at the same price as ordinary CA film.[192]

Improvements have been made in elimination of static electricity when running CA film on machines. Static eliminators can be obtained for as little cost as 15¢.[193]

Largest producer of CA is attempting to reduce the price gap between CA and cellophane. This policy is intended to reduce a competitive disadvantage of CA and to stimulate sales.[194]

CA is superior to cellophane in clarity, luster and eye appeal.[195]

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[182] Torrence, DX 1009, p. 46. Hanson, DX 1018, p. 252. DX 1008–A.
[183] DX 195, p. 398, 8/2/37. DX 1008–A.
[184] DX 1008–A.
[185] Torrence, DX 1009, p. 42. Leeds, DX 1011, p. 94. Wilcox, DX 1013, pp. 129–130.
[186] Torrence, DX 1009, p. 42. Wilcox, DX 1013, p. 122. DX 1008–B, p. 37.
[187] Martin, Tr. 6393–94. DX 289, p. 525.
[188] Abbreviated hereafter "CA".
[189] Hopping, DX 1007, p. 22. Martin, Tr. 6389. DX 1008–A.
[190] GX 6010, p. 7955. DX 142, p. 301, 11/7/49. DX 144, p. 303, 11/18/49. DX 139, p. 298, 8/18/48.
[191] Hopping, DX 1007, pp. 19, 22. GX 6010, p. 7955. DX 132, p. 287, 11/4/47; DX 133, p. 288, 12/4/47; DX 135, p. 290; DX 136, p. 291, 4/13/47; DX 137, p. 292; DX 140, p. 299, 12/7/48; DX 141, p. 300, 11/1/49; DX 331, p. 637, 1/6/47.
[192] Hopping, DX 1007, p. 18.
[193] Hopping, DX 1007, p. 22. Leeds, DX 1011, p. 91. Hanson, DX 1018, p. 253.
[194] Hopping, DX 1007, p. 22.
[195] Hopping, DX 1007, p. 22.

CA is used on a variety of food and other products including: fresh produce, bacon, tomatoes, fresh meat, pies, rolls, iced cakes, laminations, window boxes. 40% of CA film made by its largest producer is sold for packaging food.[196]

CA's major competition is cellophane.[197]

1432 It is not more expensive to run CA on packaging machinery than cellophane.[198]

Cry-O-Rap

Cry-O-Rap can be shrunk around irregular objects, unlike cellophane; and for this reason is used to wrap frozen poultry.[199]

Cry-O-Rap is superior to cellophane as a wrap for frozen poultry because of its durability at low temperatures.[200]

Cry-O-Rap is superior to cellophane in its resistance to tearing, to water absorption, and in its dimentional stability.[201]

Pliofilm

Pliofilm, although 5 or 10 points less transparent than cellophane, is not cloudy when stretched.[202]

The odor of Pliofilm was a characteristic of the early years, and never a serious technical problem.[203]

Pliofilm is superior to cellophane in moistureproofness, resistance to tearing and heat-sealing.[204]

Static electricity can be inexpensively eliminated from machines using Pliofilm.[205]

The heat-sealing range of Pliofilm is not a narrow one.[206]

Pliofilm may be printed on the same presses that print cellophane.[207]

Pliofilm is tough, tougher than cellophane.[208]

Pliofilm is more flexible than cellophane at low temperatures.[209]

1433 Pliofilm's resistance to shrinkage and resistance to water absorption are greater than cellophane.[210]

90% of Pliofilm production goes for packaging, most of this for food packaging. In this field it competes with cellophane.[211]

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[196] Hopping, DX 1007, pp. 18–19.
[197] Hopping, DX 1007, p. 20.
[198] Tindal, DX 1012, p. 114.
[199] DX 129, p. 278, 11/14/49. DX 1008–B.
[200] R. R. Smith, Tr. 5812–13. DX 1008–B.
[201] DX 1008–A.
[202] Ellies, DX 1014, pp. 151–52.
[203] Ellies, DX 1014, p. 147.
[204] Leeds, DX 1011, p. 96. Ellies, DX 1014, p. 150. DX 1008–A.
[205] Ellies, DX 1014, p. 151.
[206] Ellies, DX 1014, p. 152.
[207] Leeds, DX 1011, p. 94.
[208] Leeds, DX 1011, p. 92. R. R. Smith, Tr. 5753. Ramsay, DX 1017, p. 239., DX 1008–A; DX 1008–B.
[209] DX 116, p. 258.
[210] DX 1008–A.
[211] Ellies, DX 1014, pp. 135–36.

It is not more expensive to run Pliofilm on packaging machinery than cellophane.[212]

Polyethylene

Problems in heat-sealing and machine running of Polyethylene have been solved; it is now handled on packaging machines with no difficulty. Polyethylene has excellent heat-sealing properties. It is now printed by converters.[213]

Polyethylene has only appeared commercially since World War II, and has a promising sales potential.[214]

In resistance to tearing, resistance to water absorption, and dimensional stability, Polyethylene is superior to cellophane.[215]

Polyethylene is more durable and flexible than cellophane, particularly at low temperatures.[216]

Saran

Saran is superior to cellophane in moisture protection, resistance to tearing, resistance to water absorption, and dimensional stability.[217]

Saran can be run and heat sealed on the same model of the Hayssen machine that handles cellophane.[218]

Electronic sealing can be used where heat-sealing Saran raises technical difficulties.[219]

1434 64

Fresh meat turned black in a few hours if wrapped in MSAT. MSAT 80 film was developed, with the coating applied only to one side of the film, as an answer to the technical problem posed by fresh meat. This film will hold the color of fresh meat over a period of several days, which is something none of the previous types would do.[220]

65

Varieties of cellophane manufactured by duPont have different properties or degrees of the same properties. Varieties have more properties, and are capable of more specific functions, in common with some types of glassine and other materials, than with other types of cellophane.[221]

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[212] Tindal, DX 1012, p. 114.
[213] Southwick, DX 1008, p. 30. Leeds, DX 1011, p. 101. Tindal, DX 1012, p. 108.
[214] Leeds, DX 1011, p. 92.
[215] DX 1008–A.
[216] R. R. Smith, Tr. 5812. DX 1008–B.
[217] Eilies, DX 1014, p. 150. DX 1008–A.
[218] Tindal, DX 1012, p. 115.
[219] Martin Tr. 6440. DX 170, p. 346.
[220] Mitchell, Tr. 5477–84, 5504, 5513, 5525–26. GX 11, p. 84, 3/27/45. GX 396, p. 5490. DX 1008–A.
[221] Leinbach, Tr. 6738–41, 6747–52. Nelson, DX 1020, pp. 307–09. GX 11, p. 84, 3/27/45. GX 396, p. 5490, 5/15/50. DX 1005.

66

The principal manufacturers of flexible packaging materials include established concerns with assets which are competent to compete for flexible packaging business. The following list of companies indicates name, date of organization, and total assets in 1949 in thousands of dollars.

Name	Date of organization	Total assets in 1949 in thousands of dollars
Riegel Paper Corp.	1873	$15,285
Rhinelander Paper Co.	1903	14,720
Kalamazoo Vegetable Parchment Co.	1909	29,269
Marathon Corp.	1909	61,888
Goodyear Tire & Rubber Co.	1898	424,126
Celanese Corporation of America	1918	254,886
Aluminum Corporation of America	1888	525,870
American Viscose Corp.	1910	[222] 222,396

1435 67

Ten companies in the United States produce glassine and greaseproof papers. Their volume of output increased since 1941 and since 1946. Demand exceeded their ability to supply during World War II, from early 1947 to mid-1948 and from mid-1950 to November 1951.[223]

68

Some of the companies making glassine, waxed paper and other packaging papers are:[224]

Company	*Material*
Riegel Paper Corporation	Glassine and greasproof, waxing paper, other specialty papers.
Rhinelander Paper Company	Glassine and greasproof.
Westfield River Paper Company, Inc.	Glassine.
Deerfield Glassine Company	Glassine.
Paterson Parchment Paper Company.	Vegetable parchment and greaseproof.
Kalamazoo Vegetable Parchment Company.	Vegetable parchment and greaseproof.
Marathon Corporation	Sulphite and sulphate paper and paperboard.
Consolidated Water Power & Paper Company.	Sulphite, wrapping tissue and coated papers.
Fraser Companies Ltd. (owns Fraser Paper Co.).	Sulphite and groundwood specialty papers.
Nicolet Paper Company (subsidiary of Milprint, Inc., a major cellophane converter).	Glassine.[225]

[222] DX 983 (Table from Moody's Industrials, 1950).
[223] Nelson, DX 1020, pp. 302, 325–26.
[224] DX 983 (Moody's Industrials, 1950). Bricker, Tr. 4468–69.
[225] Hanson, DX 1018, p. 248.

1436 69

There are three domestic manufacturers of cellulose acetate film: Celanese Corporation of America, duPont, and Eastman Kodak Company, and two smaller producers.[226] Celanese produces more than all others combined.[227] DuPont manufactures less than 20% of the total domestic production of cellulose acetate packaging films.[228]

70

Aluminum foil is manufactured in U. S. by Aluminum Company of America, Reynolds Metals Co., Johnson Aluminum & Metal Co., Cochrane Foil Co., Republic Foil Co., Stranahan Foil Co., Kaiser Chemical & Aluminum Co., Aluminum Foils Co., and Standard Rolling Mills.[229]

71

There are 300 firms in the United States manufacturing polyethylene film,[230] including Visking Corporation, Plax Corporation, Fabricon Products, Inc., duPont, and the Harwid Company.[231] DuPont manufactures less than 10% of the polyethylene film made in the United States.[232]

72

Goodyear Tire and Rubber Company Company is the producer in the United States of rubber hydrochloride film, which Goodyear calls Pliofilm.[233] The Dow Chemical Company is the domestic producer of Saran, and Dewey and Almy Chemical Company is the producer of Cry-O-Rap.[234]

1437 73

All other flexible packaging materials are, like cellophane, sold direct to the packager by the manufacturer[235] and are sold indirectly through converters.[236]

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[226] Hopping, DX 1007, p. 17. GX 583 (Imp. Doc. No. 39), p. 14, 5/16/49. GX 6012 (Imp. Doc. No. 1), p. 18 and appendix Table IV, 5/18/49. DX 983 (Moody's Industrials, 1950). Bricker, Tr. 4468–69.

[227] Hopping, DX 1007, p. 17.

[228] R. R. Smith, Tr. 5663–64. GX 573 (Imp. Doc. No. 13), p. 3, 1/26/51. Hopping, DX 1007, p. 17.

[229] Torrence, DX 1009, p. 41. DX 983 (Moody's Industrials, 1950). Bricker, Tr. 4468–69.

[230] Martin, Tr. 6442.

[231] GX 6013 (Imp. Doc. No. 45), 1/4/50. GX 6020, p. 8094, 1950. GX 6012 (Imp. Doc. No. 40), p. 4, 5/18/49. Martin, Tr. 6443. Olson, Tr. 8809.

[232] GX 580, p. 7330, 8/8/50. R. R. Smith, Tr. 5663–64.

[233] GX 6012 (Imp. Doc. No. 1), pp. 8–10, 5/18/49.

[234] GX 6012 (Imp. Doc. No. 1), p. 10, 5/18/49.

[235] Jakes, DX 1006, p. 10. Hopping, DX 1007, p. 18. Torrence, DX 1009, p. 43. Wilcox, DX 1013, p. 126. Ramsay, DX 1017, pp. 228–30. Nelson, DX 1020, p. 303.

[236] Martin, Tr. 6334. Jakes, DX 1006, p. 10. Hopping, DX 1007, p. 18. Torrence, DX 1009, p. 43. Leeds, DX 1011, p. 79. Wilcox, DX 1013, p. 126. Foland, DX 1015, p. 184. McCurry, DX 1016, p. 219. Ramsay, DX 1017, pp. 226, 228–30. Hanson, DX 1018, pp. 248–51. Ekstrom, DX 1019, p. 284. Nelson, DX 1020, p. 303. DX 984, 986, 988. DX 1014-C, pp. 166, 174, 8/30/51.

74

Cellophane and other flexible packaging materials are sold for packaging retail merchandise, particularly food products.[237]

75

The converting business is competitive both as among converters and among alternative materials. Converters selling wraps to a certain trade compete with wraps of the same or different materials sold by other converters to the same trade, and business gained by one converter is denied to the rest. In addition, converters compete with each other in the development of new uses for packaging materials in trades where no packaging is used.[238]

76

Elements of competition among converters include: price differentials, technical service to customer's production departments, merchandising service to the customer's sales departments, quality of printing or manufacture of converted products, degree of protection afforded by the converted wrap to customer's product, advertising, direct salesmanship brought to bear upon individual customers or potential customers, and degree of cooperation
1438 that can be obtained from the manufacture of the packaging materials used by any given converter.[239]

77

About 4,000 converter salesmen are engaged in selling converted flexible packaging materials to customers in the food industry and other trades.[240] Most converter salesmen sell a full line of materials, but concentrate upon a single trade. Some salesmen are specialists in the baking industry, or the meat packing industry, but each salesman sells cellophane and other flexible packaging materials to his trade. Each type of wrap may be sold separately or in combination with others, according to the needs and desires of each customer at the time.[241]

78

Some of the principal converters of flexible packaging materials are:

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[237] R. R. Smith, Tr. 5672-73. Martin, Tr. 6336-38.

[238] Martin, Tr. 6372-74, 6454-55. Leeds, DX 1011, p. 87. Goland, DX 1015, pp. 189-90. Ramsay, DX 1017, pp. 228-30. Hanson, DX 1018, pp. 250-51. Croy, DX 1021, p. 342. Elmstrom, DX 1019, pp. 283-85. DX 988.

[239] Martin, Tr. 6371-74, 6454-55. Leeds, DX 1011, p. 87. Hanson, DX 1018, pp. 254-55. Ramsay, DX 1017, p. 245. Elmstrom, DX 1019, p. 284.

[240] R. R. Smith, Tr. 5667.

[241] Hanson, DX 1018, p. 255. Leeds, DX 1011, p. 89. Ramsay, DX 1017, p. 245. Martin, Tr. 6363.

American Paper Goods Co.
Benj. C. Betner Co.
Dixie Waxpaper Co., Inc.
Dobeckmun Co.
Fabricon Products, Inc.
Forbes Lithograph Mfg. Co.
Kalamazoo Vegetable Parchment Co.
Marathon Corporation
Munson Bag Co.
Milprint, Inc.
Nashua Gummed & Coated Paper Co.
Oneida Paper Products, Inc.
Reynolds Metals Co.
Shellmar Products Corp.
Fraver Corporation
Union Bag and Paper Corp.
U. S. Envelope Co.
Waxide Paper Co.
Western Waxed Paper Co.[242]

None of these companies converts cellophane exclusively.

1439 An analysis of the 1949 sales by these companies of concerted flexible packaging materials showed cellophane to be 19.3% of the total business of these companies. The other 80.7% of their sales comprised aluminum foil, glassine, Pliofilm, polyethylene, cellulose acetate, waxed paper, sulphite, vegetable parchment, a small amount of kraft paper and all combinations and laminations of these materials.[243]

79

Converters sell two or more flexible packaging materials in combination to produce a particular wrap or package. Nineteen major representative converters produced the following combinations in 1949:[244]

Cellophane and combinations:

Cello MT.
Cello PT.
Duplex Cello MT.
Coated Cello, MT.
Cello MT and Glassine, Window Type.
Duplex Cello PT.
Cello MT and Kraft, Window Type.
Cello PT and Kraft, Window Type.
Laminated Cello MT.
Coated Laminated Cello MT.
Duplex Cello MT and Glassine.
Cello MT and Vellum, Paper Window Type.
Laminated Cello MT to Foil.
Laminated Cello MT to Kraft.
Cello PT and Greaseproof, Window Type.

[242] Bricker, Tr. 4472–74.
[243] DX 986.
[244] DX 987. Bricker, Tr. 4472–84. Croy, DX 1021, p. 15.

Cellophane and combinations—Continued
Laminated Cello MT to Waxed Sulphite.
Laminated Cello MT to Opaque Glassine.
Miscellaneous Cellophane Combinations.
1440 Foil and combinations (except with cellophane):
Foil.
Laminated Foil to Tissue.
Laminated Foil to Waxed Tissue.
Laminated Foil to Glassine.
Laminated Foil to Bond.
Laminated Foil to Glassine to Coated Foil.
Laminated Foil to Acetate.
Laminated Coated Foil to Parchment.
Laminated Coated Foil to Tissue.
Laminated Foil to Kraft.
Laminated Foil to Tissue to Tissue.
Laminated Foil to Parchment.
Laminated Foil to Acetate to Pliofilm.
Miscellaneous Foil Combinations.
Laminated Foil to Sulphite.

Glassine and combinations (except with cellophane or foil):
Glassine.
Waxed Glassine.
Laminated Glassine.
Duplex Glassine and Kraft.
Duplex Glassine and Bleached Kraft.
Laminated Glassine to Kraft.
Duplex Waxed Glassine.
Coated Glassine.
Duplex Laminated Glassine and Bleached Kraft.
Duplex Glassine.
Duplex Laminated Glassine and Kraft.
Opaque Glassine.
Waxed Laminated Glassine.
Duplex Glassine and Sulphite.
Laminated Glassine to Opaque Sulphite.
Duplex Waxed Glassine and Sulphite.
Triplex Glassine and Kraft and Kraft.
Miscellaneous Glassine Combinations.
1441 Films and combinations (except with cellophane, foil, glassine or other papers):
Pliofilm.
Polyethylene.
Cellulose Acetate.

Films and combinations (except with cellophane, foil, glassine or other papers)—Continued
Coated Pliofilm.
Visten 10.
Vinyl.
Laminated Pliofilm.
Miscellaneous Synthetic Films.
Papers and combinations (except with cellophane, foil or glassine):
Waxed Bleached Sulphite.
Waxed Opaque Sulphite.
Waxed Kraft.
Parchment.
Sulphite.
Kraft.
Waxed Clear Transparent.
Moldproofed Sulphite.
Bleached Kraft.
Kraft and Mesh, Window Type.
Waxed Parchment.
Waxed Twisting.
Laminated Waxed Sulphite.
Dry Waxed.
Waxed Manila.
Greaseproof.
Duplex Kraft.
Laminated Sulphite.
Waxed Tissue.
Duplex Kraft and Waxed Kraft.
Waxed Opaque Twisting.
Manila.
Casein Coated Sulphite.
Tissue.
1442 Duplex Wet Strength Kraft.
Duplex Kraft and Asphalt Laminated Kraft.
Duplex Kraft and Bleached Kraft.
Coated Sulphite.
Laminated Waxed Sulphite to Tissue.
Waxed and Treated Sulphite.
Laminated Waxed Manila.
Triplex Kraft and Kraft and Kraft.
Asphalt Laminated Sulphite.
Waxed Bleached Kraft.
Miscellaneous Papers.

V. DuPont Competed by Research to Improve Quality and Lower Cost

(Findings 80–122)

80

When duPont commenced sale of cellophane, it was not of a quality which would enable it to compete for flexible packaging business. Cellophane was brittle, not available in the roll form essential for machine packaging operations, non-moistureproof.[245] It was necessary for duPont to engage in research to overcome these deficiencies, and, as they were overcome to continue research looking toward a quality improvement so cellophane would remain competitive with other flexible packaging materials in meeting the requirements of buyers of flexible packaging materials.[246]

81

DuPont did not engage in cellophane research with the intent of monopolizing the manufacture of cellophane.[247]

1443

82

In duPont organization there were no chemists skilled in viscose chemistry. Research facilities were inadequate and research chemists were difficult to find.[248]

83

DuPont by research[249] improved efficiency of its manufacture,[250] reduced cost of production,[251] improved quality of cellophane,[252] and developed new types.[253]

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[245] McCune, Tr. 5538. DX 388–A, p. 719, 7/10/24; DX 390–A, p. 723, 9/5/24; DX 392 pp. 726, 727, 5/21/24; DX 299, pp. 571–74, 8/19/24; DX 305, p. 586, 1/10/28.

[246] Carpenter, Tr. 6276. Yerkes, Tr. 6940, 6943. Mitchell, Tr. 5477–81. McCune, Tr 5538–39, 5580. Benger, Tr 5438–40. DX 396, p. 736, 5/7/30.

[247] Carpenter, Tr. 6275–76. Yerkes, Tr. 6940. W. W. Smith, Tr. 6506–09. McCune, Tr. 5538–39, 5580. Benger, Tr. 5440. Mitchell, Tr. 5528. DX 398–402.

[248] Benger, Tr. 5417–20.

[249] Benger, Tr. 5418–20. DX 398, p. 740.

[250] McCune, Tr. 5539–49. DX 386, p. 716.

[251] GX 575 (Imp. Doc. No. 16), 1950. GX 494, pp. 6626–27, 1/18/40.

[252] Michell, Tr. 5477–90, 5504–10, 5513–16. DX 346, p. 661, 8/1/29.

[253] Benger, Tr. 5437–38. Mitchell, Tr. 5482. GX 396, pp. 5490–93.

DuPont cellophane technical activities expense totalled $24,361,065 during the period 1924–1950. Annual amounts expended for such activities by duPont increased:[254]

1924	$89,139
1931	471,374
1939	793,195
1944	1,131,790
1949	2,289,507
1950	2,782,706

84

Research projects by duPont originate in problems of sales group, from production problems in plants, or as idea of one of the research men. Research relating to specific problems was discussed with sales, technical and production management in Wilmington before projects were approved.[255]

85

The purpose of duPont's research has been to enable it to improve profits and to compete with other manufacturers of
1444 flexible packaging materials, including other makers of cellophane, by reducing cost, improving quality and developing types of moistureproof cellophane designed to meet specific packaging needs.[256] This research has involved developments at all stages of the manufacturing processes, and improvement in every phase of cellophane quality.[257]

86

Cellophane and other flexible packaging materials are sold to and used interchangeably on packaging machines and converters' equipment. DuPont's efforts by research to improve quality and broaden cellophane markets not only gave impetus to cellophane sales but also stimulated improvements in other materials and caused improvement in utility and acceptance of flexible packaging materials generally.[258]

87

DuPont's research to improve quality of cellophane was for purpose of enabling it to meet competition of waxed paper and glassine, and its research to reduce costs of cellophane manufacture was for purpose of lowering costs so prices might be reduced and markets broadened.[259]

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[254] DX 387, p. 717.

[255] Mitchell, Tr. 5475–76. Benger, Tr. 5440–41.

[256] Carpenter, Tr. 6275–76. McCune, Tr. 5538–39, 5580. Yerkes, Tr. 6940, 6943. DX 398, pp. 740–41; DX 396–404. GX 442, p. 5783, 1/23/34.

[257] McCune, Tr. 5539–82; 5610. Mitchell, Tr. 5477–81, 5486–5528.

[258] Leinbach, Tr. 6768, 6770–71, 6774. R. R. Smith, Tr. 5706, 5727–29. Tindal, DX 1012, pp. 109–10, 113–14. Ramsay, DX 1017, p. 233.

[259] Carpenter, Tr. 6275–76. Yerkes, Tr. 6940. McCune, Tr. 5538–39, 5580. Mitchell, Tr. 5470–94. DX 398, pp. 740–41; DX 395, p. 734, 6/4/28; DX 399, p. 742, 12/29/28. GX 431, p. 5678, 4/26/29; GX 435, p. 5728, 7/21/30; GX 455, p. 5885–89, 4/21/30; GX 28, p. 143, 11/30/45.

88

DuPont did not engage in research for purpose of blocking competitors. DuPont's research has not been channelled into any emphasis for anti-competitive reasons.[260]

1445 89.

Results of duPont's research are reflected in manufacturing efficiency of film, and solution of problems in the use of cellophane. Following are illustrations typical of these various results.

(a) Quality: Uniformity of sheet flatness, which is essential to printing; and uniformity of film thickness, which is essential to production of rolls that will handle on high speed machines.[261]

(b) Manufacturing Efficiency: Average pounds cast per casting machine day increased from 3,292 in 1931 to 9,963 in 1950; maximum casting machine speeds increased from 30 meters per minute in 1932 to 120 meters per minute in 1952: average pounds coated per coating tower day increased from 3,956 in 1931 to 15,371 in 1950: finishing waste dropped from 15.7% in 1924 to 3.5% in 1950,[262] and solvent recovery increased from 83% to 97%.[263]

(c) New Types: Basic moistureproof cellophane; moistureproof coatings with greater resistance to passage of moisture; types of moistureproof cellophane tailored for dry or humid climates: types with coating anchored to permit use on wet products: special formulations of moistureproof cellophane for fresh meats, differing types of breads and candies, milk bottle hoods and other specialized types.[264]

(d) Solution of Problems in the Use of Cellophane: Development of adhesives for sealing moistureproof cellophane; heatsealable coatings: improvement of slip and other machine running characteristics; determination of type best suited for a
1446 particular product; determination of qualities in a wrap for a new product.[265] Research work on the examples given in most cases was conducted over a number of years.[266]

90

High speed packaging machines require material in roll form for continuous operation.[267] Uniformity of the rolls is important

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[260] Benger, Tr. 5440–41. W. W. Smith, Tr. 6506–09. McCune, Tr. 5538–39, 5580. Mitchell, Tr. 5528. DX 398.

[261] Mitchell, Tr. 5477–78. Martin, Tr. 6378. DX 396, p. 1930. DX 397, p. 737, 1930.

[262] McCune, Tr. 5540–42. DX 386, p. 716.

[263] McCune, Tr. 5544.

[264] Mitchell, Tr. 5481–84, 5504, 5524. Benger, Tr. 5437–38. GX 396, pp. 5490–93. DX 408, pp. 794–808, 10/1/48.

[265] Mitchell, Tr. 5493–94, 5513–16.

[266] E.g., Mitchell, Tr. 5479–71. GX 587, p. 17, 4/28/50.

[267] Tindal, DX 1012, p. 105. Leinbach, Tr. 6746.

at all speeds and becomes critical as speeds of the packaging machines increase.[268]

91

When duPont began production of cellophane, packaging machinery was in existence that handled waxed paper and glassine satisfactorily.[269] Such machinery would not handle cellophane.[270] Shortly after the start of its manufacture of cellophane, duPont promoted development and use of packaging machinery that could handle both cellophane and other flexible packaging materials interchangeably.[271] This program included work with the manufacturers of packaging machinery to assist them with problems created by the attempt to use cellophane on their machines,[272] promotion of use of such machinery for cellophane by customers,[273] and technical service to customers who encountered difficulty in use of cellophane on packaging machinery.[274] The work was done by a group of mechanical engineers employed and retained by duPont.[275] DuPont's work in the development of packaging machinery and its use has contributed to the growth of sales of cellophane.[276]

1447

92

Mechanization of wrapping enabled duPont to obtain new cellophane customers, in industries where cost of hand wrapping prohibited use of the material.[277]

93

When duPont commenced manufacturing cellophane the product was not of adequate quality for sale in roll form. Since cellophane has a thickness of 1/1000 of an inch, when wound in commercial rolls of 9" outside diameter, consisting of thousands of layers of film, irregularities of thickness in cellophane as then manufactured created a lumpy, unusable roll. DuPont recognized need for roll cellophane if sales in volume were to be obtained.[278] The characteristic of cellophane for sales in rolls is uniformity of gauge to fine tolerance.

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[268] Goland, DX 1015, p. 185. Leeds, DX 1011, p. 82. Russell, Tr. 6470. Martin, Tr. 6366–67.
[269] Tindal, DX 1012, p. 104. Russell, Tr. 6476.
[270] Russell, Tr. 6479–80.
[271] Russell, Tr. 6484–88.
[272] Tindal, DX 1012, p. 109. Russell, Tr. 6484–85.
[273] Russell, Tr. 6476–77.
[274] Russell, Tr. 6480.
[275] Tindal, DX 1012, p. 109. Russell, Tr. 6475–76.
[276] Russell, Tr. 6487–88.
[277] GX 435, p. 5728, 7/21/30. Russell, Tr. 6487–88.
[278] GX 392, p. 5439, 4/14/23. Martin, Tr. 6378.

DuPont offered rolls in 1925.[279] By 1930 approximately 50% of its production was sold in roll form.[280] Not much of the production in that period would be salable today for slit rolls.[281] Currently, duPont sells 90% of its production in roll form.[282]

DuPont's development of quality rolls was for the purpose of increasing sales, and had that effect.[283]

94

DuPont's development of moistureproof cellophane was stimulated by duPont's inability to sell non-moistureproof cellophane in competition with waxed glassine and waxed paper for wrapping cookies, crackers, candies, biscuits and baked goods.[284]

1448 95

DuPont still strives to improve quality of its product and reduce cost of production by the application of research to its manufacturing processes.[285]

96

DuPont's sales efforts increased competition between flexible packaging materials. Through technical research and market analysis, and development of new types of film duPont was able to penetrate markets previously dominated by other materials, and to enter markets that did not use flexible wrapping materials. This stimulated technical developments by other producers of flexible wrapping materials to produce new types that would better compete in the same markets. General development of the market of flexible wrapping materials has stimulated development of new types of films.[286]

97

DuPont after years of development produced a type of cellophane that would retain the natural color of fresh meat for the necessary period of sales life. In 1947, when this film was introduced, Pliofilm was unsuitable for wrapping fresh meat.[287] After

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[279] GX 398, pp. 5509–10, 5/15/50.
[280] McCune, Tr. 5579.
[281] McCune, Tr. 5580.
[282] McCune, Tr. 5579.
[283] DX 452, p. 882, 3/4/29.
[284] DX 388–A, p. 719, 7/10/24; DX 391–A, p. 725, 10/17/24; DX 393, pp. 728–33, 9/25/24; DX 339, p. 647, 4/23/26; DX 7A, p. 9, 5/25/26; DX 12, p. 15, 10/25/27; DX 304, p. 585, 1/13/28; DX 305, p. 586, 1/10/28.
[285] GX 587, p. 17, 4/28/50.
[286] GX 589, p. 7531, 6/8/51; GX 6013 (Imp. Doc. No. 45), 1/4/50. Jakes, DX 1006, pp. 15–16. Torrence, DX 1009, p. 44. Horn, DX 1010, p. 73. Leeds, DX 1011, p. 94. Tindal, DX 1012, p. 108. Ellies, DX 1014, pp. 134, 137–39. Ramsay, DX 1017, p. 233. Hanson, DX 1018, p. 254. Nelson, DX 1020, p. 316. Croy, DX 1021, p. 344. R. R. Smith, Tr. 5713. Leinbach, Tr. 6742–43, 6774, 6780–81.
[287] GX 589, p. 7531, 6/8/51.

duPont's success, Goodyear was stimulated to research which resulted in development of a type of Pliofilm satisfactory for fresh meat packaging.[288] Fresh meat became one of the most important markets for Pliofilm.[289]

1449 98.

Cellophane has been successful as a packaging medium. Continued success in the sale of cellophane for packaging depends upon further research to improve quality.[290]

99

Plain cellophane was not suitable for wrapping where moisture protection was necessary.[291] DuPont's experience in attempting to sell plain cellophane for packaging such products as hard candies and bakery goods confirmed plain cellophane could not compete for these uses.[292] In 1924, the same year it began production of plain cellophane, duPont commenced research to discover moistureproof cellophane.[293] This work was successful and experimental production of moistureproof cellophane began by 1926.[294] Prices for moistureproof cellophane were regularly listed for the first time in November 1928.[295] The basic product patent on moistureproof cellophane, U.S. Patent No. 1,737,187 was issued on November 26, 1929.[296]

100

Invention of moistureproof cellophane enabled sales to customers who were mass producers of low cost products requiring moisture protection.[297] These included most foods and tobacco products. Earliest of such industries was the cigarette and cigar industry, which in the early 1930's changed to cellophane[298]
1450 as a protective wrapper in place of waxed glassine and other materials previously used.[299]

After invention of moistureproof cellophane much of duPont's research was directed to improvements of the basic product mois-

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[288] Ellies, DX 1014, p. 137.
[289] Ellies, DX 1014, p. 138.
[290] GX 583 (Imp. Doc. No. 39), pp. 1–2. DX 408, pp. 794–808. Carpenter, Tr. 6276. Mitchell, Tr. 5527–28.
[291] GX 392, p. 5437, 5/1/23.
[292] DX 390, p. 723, 9/5/24; DX 391, p. 724, 10/17/24; DX 338, p. 718, 7/10/24; DX 389, p. 721, 7/11/24.
[293] DX 392, p. 726, 5/21/24; DX 393, p. 728, 9/25/24; DX 394, p. 733, 10/1/24.
[294] GX 481, p. 6370, 1/17/27; GX 2467, p. 3157, 7/13/43.
[295] GX 398, p. 5524, 5/15/50.
[296] GX 2001, Schedule A, p. 1981, 7/13/49.
[297] GX 431, p. 5678, 4/26/29.
[298] DX 348, p. 663, 1/1/30. GX 435, p. 5728, 7/21/30. DX 194, p. 395, 7/16/37. GX 438, p. 5755, 2/9/32.
[299] R. R. Smith, Tr. 5822. Leinbach, Tr. 6769. DX 194, p. 395, 7/16/37.

101

tureproof cellophane.[300] Forty different types of moistureproof cellophane were developed by duPont.[301] Research work connected with moistureproof cellophane included development of adhesives,[302] development of coatings that could be sealed by heat without the use of adhesives,[303] development of anchoring the coating,[304] and development of coatings with special characteristics required by different products.[305] DuPont was issued patents from time to time on various of its inventions.[306] Validity of patents is not challenged.[307]

102

DuPont developed over fifty types of cellophane tailored for end uses.[308] For example, different types are manufactured for fresh vegetables,[309] for cigarettes,[310] for hot hard candies,[311] for cold hard candies,[312] for wet products,[313] for frozen products,[314] for prepared meats,[315] and for fresh meats.[316]

103

Since entering cellophane, duPont has produced 174 varieties of cellophane.[317] In 1949, duPont made sales of 108 different varieties of cellophane.[318]

104

Original moistureproof cellophane could not be sold for mass-produced bakery products,[319] which were packaged by machines in heat sealing materials, especially waxed paper and waxed glassine.[320] Moistureproof cellophane, since not sealable by heat, would not work on these machines.[321] Adhesives necessary to seal moistureproof cellophane had an objectionable reaction on bakery products.[322] DuPont research developed a heat sealing moistureproof cellophane by 1932.[323] This enabled penetration of the

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[300] GX 489, pp. 6489–90. DX 400, p. 752, 10/11/28. Mitchell, Tr. 5477–82.
[301] GX 11, pp. 86–90, 3/27/45. Mitchell, Tr. 5482.
[302] DX 403, p. 769, January 1927.
[303] Mitchell, Tr. 5478, 5513–15. DX 554, p. 1063, 1/30/41. GX 440, p. 5770, 1/27/33; GX 441, p. 5779, 7/27/33; GX 442, p. 5723, 1/23/34.
[304] DX 399, p. 745, 4/29/30. Mitchell, Tr. 5504–10.
[305] DX 47, p. 85, 5/27/38. GX 11, pp. 86–90, 3/27/45. Mitchell, Tr. 5517–18, 5525–26.
[306] GX 2001, p. 1981, et seq. Mitchell, Tr. 5499.
[307] Minicus Tr. 6960–62.
[308] GX 11, pp. 85–90. DX 408, pp. 794–808.
[309] DX 408, p. 801.
[310] DX 408, p. 795.
[311] DX 408, p. 795.
[312] DX 408, p. 795.
[313] DX 408, p. 807.
[314] DX 408, p. 799.
[315] DX 408, p. 798.
[316] DX 408, p. 798.
[317] GX 396, pp. 5490–93, 5/15/50.
[318] GX 396, pp. 5494–97, 5/15/50.
[319] DX 388, p. 718, 7/10/24; DX 6, p. 6, 3/19/26; DX 339, p. 647, 4/23/26.
[320] DX 70, pp. 153–61, 10/49. Russell, Tr. 6476. R. R. Smith, Tr. 5682–83.
[321] Russell, Tr. 6479. Mitchell, Tr. 5478.
[322] Mitchell, Tr. 5513, 5516.
[323] GX 440, p. 5770, 1/28/33; GX 441, p. 5779, 7/27/33. Mitchell, Tr. 5513.

bakery industry to which duPont had been unable to sell in volume.[324] During 1933 duPont direct sales to that industry amounted to 4,500,000 lbs.[325] and in 1934 to 7,000,000 lbs.[326] This increased over 13,000,000 lbs. in 1937, and continued to grow.[327] The bakery industry is now the largest single consumer of cellophane, accounting for 52,700,000 lbs. of duPont cellophane in 1949.[328]

105

Moistureproof coatings unless anchored have tendency to
1452 slough off in the presence of considerable moisture,[329] and unanchored moistureproof film is unsuitable for packaging such products as frozen foods and fish, fresh produce, and meats.[330] Research on anchoring the coating was undertaken by duPont in 1928 to obtain a film adaptable to such uses.[331] DuPont's research resulted in an anchored coating,[332] and research has continued for the purpose of improving quality of product and reducing cost of its production.[333] A further development by duPont of a film for fresh meat opened that market to cellophane.[334] DuPont's research on anchoring the moistureproof coating led to substantial improvement in duPont's sales.[335]

106

Development of anchoring for the moistureproof coating on duPont cellophane was stimulated by loss of business to glassine, resulting from loss of cellophane's moistureproofness when the coating came into contact with greasy or wet products.[336]

107

Manufacturing process obtained by duPont from the French was sound from engineering standpoint.[337] However, duPont made improvements by placing the process under control for quality purposes, improving machine efficiencies and redesigning machines to enable more continuous operation.[338]

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[324] GX 442, p. 5783, 1/23/34. Mitchell, Tr. 5517–18.
[325] GX 489, p. 6487, 1/22/35.
[326] GX 77, p. 252, 2/11/36.
[327] GX 492, p. 6564, 1/25/38; GX 78, p. 268, 2/2/38.
[328] DX 409, p. 809, 2/9/50.
[329] DX 399, p. 743, 12/29/28. Mitchell, Tr. 5479.
[330] DX 399, p. 751, 12/29/28. Mitchell, Tr. 5504.
[331] DX 399, p. 743, 12/29/28. Mitchell, Tr. 5505.
[332] Mitchell, Tr. 5479.
[333] Mitchell, Tr. 5510.
[334] Mitchell, Tr. 5525–26. R. R. Smith, Tr. 5763–64.
[335] R. R. Smith, Tr. 5764.
[336] Mitchell, Tr. 5504. DX 11, p. 14, 5/18/27; DX 12–15, pp. 15–19, 1927; DX 309, p. 594, 12/4/31.
[337] Ernst, Tr. 5345–48, 5356–64. Benger, Tr. 5436–37.
[338] McCune, Tr. 5549–50, 5553, 5557, 5560. DX 386, p. 716, 1950; GX 481, p. 6385, 1/17/27; GX 483, p. 6419, 1/21/29.

108

DuPont by its efforts made improvements in the efficiency
1453 and cost of each step in the manufacture of plain cellophane and of moistureproof cellophane. Phases of manufacture at which improvements were made include steeping the wood pulp, shredding the pulp into alkali cellulose, ripening the alkali cellulose, xanthation, mixing xanthate with caustic soda to form into viscose, control and design of casting hopper and lips, handling of film through baths of the casting machine, design of rolls, drying film, application and drying of moistureproof coatings, recovery of solvent, and slitting of finished film into commercial rolls.[339]

109

The amount of raw materials required to make one pound of cellophane has been reduced as follows:

	Percent
Wood pulp	20
Caustic soda	40
Carbon bisulphide	33
Sulphuric acid	[340] 60

Finished product output per payroll hour has been increased 380%.[341]

Finished waste has been reduced from 15.3% to 3.5%.[342]

Maximum casting speeds have increased from 30 meters per minute to 120 meters per minute in 1952.[343]

Speed of film in the coating towers has increased from 30 meters per minute to upwards of 200 meters per minute.[344]

Solvent recovery has been increased from 83% up to 97%.[345]

The speed at which rolls are slit increased from 150 feet a minute to 1,000 feet a minute.[346]

DuPont's productive capacity in 1941 for 56 machines
1454 was 110,000,000 pounds, while in 1952 with the same number of machines, its production capacity was 218,000,000 pounds.[347]

The average pounds of film produced per casting machine day by duPont increased from 3,292 in 1931 to 5,698 in 1944 and 9,963 in 1950. Average pounds of film coated per coating tower day by duPont increased from 3,956 in 1931 to 8,107 in 1944 and 15,371 in 1950.[348]

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[339] McCune, Tr. 5549–79.
[340] McCune, Tr. 5539.
[341] McCune, Tr. 5540.
[342] McCune, Tr. 5540. PX 386, p. 716, 1950.
[343] McCune, Tr. 5542.
[344] McCune, Tr. 5543–44.
[345] McCune, Tr. 5543–44.
[346] McCune, Tr. 5548.
[347] McCune, Tr. 5548.
[348] PX 386, p. 716, 1950.

All of this indicia of the efficiency of manufacture is persuasive.[349]

110

In the last two years there has been one lost time accident among the 4,000 employees in duPont's cellophane plants, despite the existence of dangerous elements in cellophane manufacture.[350]

111

Since duPont commenced manufacture of cellophane, it has carried out laboratory analyses of flexible packaging materials which compete for the same end uses as cellophane. These tests cover physical and chemical properties that are important in packaging.[351] They are not made with any anti-competitive intent, but for the purpose of appraising the characteristics of competing materials as a guide to improvements in duPont's products. DuPont tries to maintain as high performance in its cellophane, relative to the performance of other flexible packaging materials, as it can.[352]

112

Since invention of moistureproof cellophane duPont has
1455 improved cellophane as to uniformity of gauge, degree of moistureproofness, ease of heat sealing, reduction of the brittleness of the film when exposed to humidity changes, and facility of operating of cellophane on high speed presses and converting and packaging machinery.[353]

113

Waxed paper, glassine, Pliofilm, foil, Saran, polyethylene and other flexible packaging materials have been improved for packaging use in the last 20 years. These improvements include strength, printability, ease of use on packaging machinery and variation of characteristics to serve specific uses.[354] Competition of cellophane has stimulated these improvements in other flexible packaging materials.[355]

[349] McCune, Tr. 5548–49.
[350] McCune, Tr. 5582–83.
[351] DX 46, p. 80, 5/15/36. DX 47, p. 84, 5/27/38. DX 48, p. 95, 1/11/39. DX 49, p. 105, 1/16/41. DX 51, p. 111, 5/3/39; DX 52, p. 119, 1/17/40. DX 78, p. 175, 6/18/34. DX 84, p. 188, 1/29/40. DX 183, p. 366, 5/22/40. DX 193, p. 385, 7/18/34. DX 195, p. 398, 8/2/37.
[352] McCune, Tr. 5584. Mitchell, Tr. 5470–84, 5534. R. R. Smith, Tr. 5831.
[353] Martin, Tr. 6380. Mitchell, Tr. 5468–90, 5504–26. Jakes, DX 1006, p. 9. Horn, DX 1010, p. 68. Wilcox, DX 1013, p. 132.
[354] Jakes, DX 1006, pp. 15–16. Hopping, DX 1007, pp. 22–23. Southwick, DX 1008, p. 30. Torrence, DX 1009, p. 44. Horn, DX 1010, p. 73. Leeds, DX 1011, p. 94. Tindal, DX 1012, p. 108. Elkes, DX 1014, pp. 134–137–39. Ramsay, DX 1017, p. 233.
[355] Leinbach, Tr. 6742–43, 6774, 6780, 6781. R. R. Smith, Tr. 5713. Nelson, DX 1020, p. 316. Ramsay, DX 1017, p. 233.

114

Improvements with respect to glassine since 1924 include:

1. An increase in strength, both bursting strength and strength when wet.[356]

2. Improvement in flexibility and folding qualities so as to make it less brittle and more acceptable as a wrap for a small merchandise where creases and corners in a wrap occur.[357]

3. Development and improvement of more transparent types.[358]

4. Development and improvement of new coatings for glassine to provide better protection against moisture, grease, vapors, etc.[359]

1456 5. Improvment of printing.[360]

6. Improvement of transparency.[361]

7. Improvement in variety of types produced for different packaging use.[362]

115

Improvements in waxed paper since 1924 include:

1. Development and improvement of translucent types of waxed sulphite.[363]

2. Development and improvement of highly opaque types of waxed paper for better background to printing.[364]

3. Development of hard crystalline waxes which are not sticky, will not rub off, and are glossy.[365]

4. Development and improvement of process printing methods which enable highly decorative effects, including direct color photographic reproductions, to be obtained with waxed paper wraps.[366]

5. Improvement of moisture resistance.[367]

6. Improvement of ease and strength of seal.[368]

116

Polyethylene film produced had disadvantages in limpness, sealability, printability and other factors.[369] Many of these deficiencies could be corrected through research,[370] and were.[371]

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[356] Jakes, DX 1006, p. 15. Horn, DX 1010, p. 73.
[357] Martin, Tr. 6381.
[358] Leinbach, Tr. 6773.
[359] Leinbach, Tr. 6773.
[360] Jakes, DX 1006, p. 15. Horn, DX 1010, p. 73.
[361] Leinbach, Tr. 6773.
[362] Leinbach, Tr. 6773.
[363] Nelson, DX 1029, p. 312. Leinbach, Tr. 6753–54.
[364] Martin, Tr. 6381. R. R. Smith, Tr. 5810. Ramsay, DX 1017, p. 233.
[365] Martin, Tr. 6381. Hanson, DX 1018, p. 254. DX 70, pp. 153 (picture and note), 155, 10/49.
[366] R. R. Smith, Tr. 5810. Hanson, DX 1018, p. 254.
[367] Croy, DX 1021, p. 344.
[368] Croy, DX 1021, p. 344.
[369] GX 6038, p. 8166, 2/1/49.
[370] GX 6038, p. 8166, 2/1/49.
[371] GX 6013 (Imp. Doc. No. 45), 1/4/50.

1457 These improvements made it an effective competitor for uses previously served by cellophane and other flexible wrapping materials.[372]

117

Although duPont in January, 1949, thought cellophane was secure against competition from other transparent films for self-service merchandising of fresh meat, luncheon meats, and fresh produce,[373] in fact Goodyear in 1950 developed a type of Pliofilm satisfactory for fresh meats, which became a major Pliofilm market.[374] Polyethylene and cellulose acetate were being improved, and making increased penetrations in the fresh produce field.[375] DuPont's development of specialized types for self-service selling of meats and fresh produce gave it a start over other materials, but improvements in the other materials enabled them to capture part of these markets from cellophane.

118

Saran, Pliofilm and polyethylene when first on the market were difficult to heat seal and run on packing machines, but are now heat sealed and mechanically run on a commercial basis on commonly used equipment.[376]

119

Qualities of types of Pliofilm have been improved since its appearance in the 1930's.[377] Odor has been eliminated, and the film has been made durable at low temperatures.[378] Important
1458 to Pliofilm sales are improvements in adaptability of machines to convert and package with Pliofilm.[379] Types have been developed that enabled penetration of new markets, notably fresh meat and dried fruit packaging.[380]

120

Cellulose acetate has been improved as to toughness of film. Improvements have been made in handling cellulose acetate film

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[372] GX 6013 (Imp. Doc. No. 45), 1/4/50.
[373] GX 6039, pp. 8168–74, 1/28/49.
[374] R. R. Smith, Tr. 5751–61, 5975–76. Ellies, DX 1014, pp. 137–38.
[375] Hopping, DX 1007, p. 19. Martin, Tr. 6353. DX 133, p. 288, 12/4/47.—DX 139, p. 298, 8/18/48. DX 140, p. 299, 12/7/48. DX 141, p. 300, 11/1/49. DX 143, p. 303, 5/10/50. R. R. Smith, Tr. 5820, 5996.
[376] Martin, Tr. 6438–40. Russell, Tr. 6467, 6474. Southwick, DX 1008, p. 30. Tindal, DX 1012, pp. 108, 114–15. Ellies, DX 1014, p. 139. Deeds, DX 1011, p. 101. Ramsay, DX 1017, pp. 235–36. GX 6012 (Imp. Doc. No. 40), pp. 11–12, 5/18/49.
[377] Ellies, DX 1014, p. 147. Martin, Tr. 6382.
[378] Ellies, DX 1014, p. 147.
[379] Tindal, DX 1012, p. 108.
[380] Ellies, DX 1014, pp. 137–39.

mechanically to avoid generation of static electricity.[381] Heat sealing cellulose acetate film is now under development.[382]

121

Sales of cellophane bags are vulnerable to competition from polyethylene.[383]

122

Other manufacturers of flexible packaging materials engage in research to improve their products and sales. DuPont does not have power to subvert use or to engross trade secrets and technical knowledge either as to cellophane or as to flexible packaging materials.[384]

VI. DuPont Competed by Lowering Prices

(Findings 123–149)

123

The objective of duPont was to reduce price to a level where cellophane could compete with other flexible packaging materials. Price of cellophane in relation to prices of other flexible packaging materials was such that only luxury items would use it as a
1459 wrap. It was necessary to develop volume, lower cost and improve quality and bring the price of cellophane down to a point where it would receive acceptance in the packaging markets. DuPont sought a low profit per unit of sale in effort to achieve lower prices which would develop volume sales and increase profits.[385]

124

From start of production of cellophane in 1924 until 1947 duPont made 21 price reductions which lowered price of plain cellophane (300 gauge) per pound from $2.65 to 33¢.[386] During period from the first commercial offer of moistureproof film to 1947 duPont reduced the price per pound (300 gauge) from $1.60 to 42¢.[387] Since 1947 duPont's prices for these types have increased to 49¢ and 51¢, respectively, as of December 15, 1950.[388]

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[381] Hopping, DX 1007, p. 22.
[382] Hopping, DX 1007, p. 18.
[383] GX 6032, p. 8156, 6/11/48. GX 6013 (Imp. Doc. No. 45), 1/4/50. Southwick, DX 1008, p. 30.
[384] Reichel, Tr. 6020, 6045–46, 6048. Jakes, DX 1006, pp. 15–16. Tindal, DX 1012, pp. 108, 111. Ellies, DX 1014, pp. 137–39, 142. Ramsay, DX 1017, pp. 225–26, 233. Nelson, DX 1020, pp. 308–09, 323. Croy, DX 1021, pp. 340–41, 344.
[385] Yerkes, Tr. 6939–42. Carpenter, Tr. 6275–76. DX 337, p. 643, 12/11/24. DX 338, p. 645, 2/2/25. DX 339, pp. 648, 650–3, 4/23/26. GX 1483, p. 7051, 4/25/26. GX 347, pp. 866–69, 12/31/29. GX 483, p. 6412, 1/2129. GX 431, p. 5678, 4/26/29. GX 190, p. 6499, 1/27/36. See also DX 34[illegible] 365.
[386] GX 1, p. 12, 2/17/44. GX 396, pp. 5498–5502, 5/[illegible]/50.
[387] GX 1, p. 12, 2/17/44. GX 396, pp. 5498–5502, 5/[illegible]/50.
[388] DX 591, p. 1128.

125

Above price reductions cellophane customers enjoyed reductions in cost of using duPont cellophane during the period 1924 to date as the result of improvement in quality of duPont cellophane [389] without any increase in price per pound.[390]

126

Annual average prices received by duPont per pound of cellophane sold have been: [391]

Year	Average price	Year	Average price
1924	2.508	1938	.416
1925	1.927	1939	.398
1926	1.713	1940	.380
1927	1.431	1941	.382
1928	1.211	1942	.396
1929	1.066	1943	.404
1930	.863	1944	.419
1931	.643	1945	.416
1932	.556	1946	.401
1933	.504	1947	.419
1934	.481	1948	.460
1935	.431	1949	.483
1936	.413	1950	.490
1937	.415		

127

DuPont's price reductions were made by improvement in efficiency of manufacturing and by increased volume of sales attained by improvements in the quality of duPont's cellophane.[392]

1461 128

All types of duPont moistureproof cellophane are sold at prices different from those of duPont plain cellophane.[393]

129

Types of duPont moistureproof cellophane are sold at different prices, and have different characteristics.[394]

130

1949 average wholesale prices of flexible packaging materials in the United States were: [395]

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[389] Mitchell, Tr. 5477–81.
[390] DX 336, p. 642, 1950.
[391] DX 336, p. 642, 1950.
[392] Yerkes, Tr. 6940–42. Carpenter, Tr. 6278–79. DX 338, p. 645, 2/2/25. DX 348, p. 663, 2/1/30. DX 340–41, 344–46, 348–51, 353–54, 357, 360–361, 363–64, 368.
[393] GX 396, pp. 5498–5502, 5/15/50. GX 6002, p. 8110, 6/8/51.
[394] GX 396, pp. 5498–5502, 5/15/50. GX 6002, p. 8110.
[395] DX 995.

Packaging material	Price per 1,000 square inches	Price per pound	Yield per pound
	Cents	*Cents*	*Square inch*
Saran: 100-gauge #517	6.1	99.0	16,300
Cellulose acetate: .00088"	3.3	82.0	25,000
Polyethylene: .002"—18" flat width	5.4	81.0	15,000
Pliofilm: 120-gauge N 2	3.8	80.8	21,000
Aluminum foil: .00035"	1.8	52.2	29,200
Moistureproof cellophane: 300 MST-51	2.3	47.8	21,000
Plain cellophane: 300 PT	2.1	44.8	21,500
Vegetable parchment: 27#	1.4	22.3	16,000
Bleached glassine: 25#	1.0	17.8	17,280
1462 Bleached greaseproof: 25#	.9	15.8	17,280
Plain waxed sulphite: 25# self-sealing	1.1	15.2	14,400
Plain waxed sulphite: 25# coated opaque	.7	11.9	17,280
Cry-O-Rap	Sold only in converted form. No unconverted quotations.		

131

December 15, 1950, the latest date for which list prices are in the record, duPont's price for 300 gauge moistureproof heat sealing cellophane was 51¢ per lb.; for 300 moistureproof heat sealing anchored cellophane, 59¢ per lb.; for 300 gauge non-moistureproof cellophane, 49¢ per lb.; and for 300 gauge non-moistureproof rancidity resistant colored cellophane, 67¢ per lb.[396]

132

The price of cellophane is today an obstacle to its sales in competition with other flexible packaging materials.[397]

133

Cellophane has always been higher priced than the two largest selling flexible packaging materials, wax paper and glassine, and this has represented a disadvantage to sales of cellophane.[398]

134

DuPont considered as a factor in the determination of its prices, the prices of waxed paper, glassine, greaseproof, 1463 vegetable parchment, and other flexible packaging materials.[399]

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[396] DX 591, p. 1128; 1951.

[397] Horn, DX 1010, p. 73. Leeds DX 1011, pp. 91–92. McCurry, DX 1016, pp. 207, 211. Elmstrom, DX 1019, pp. 284–85. Croy, DX 1021, p. 341.

[398] R. R. Smith, Tr. 5674–5842. Nelson, DX 1020, p. 317. Leeds, DX 1011, pp. 91–92. GX 347, p. 869, 12/31/29. DX 375, p. 704, 6/22/48. DX 378, p. 708, 6/22/48. DX 994 (Graph).

[399] Yerkes, Tr. 6942. GX 347, p. 869, 12/31/29. DX 327, p. 633, 11/20/39. DX 355, p. 670, 6/19/34. DX 375, p. 704, 6/22/48. DX 378, p. 708, 6/22/48.

135

DuPont, in reducing its prices, intended to narrow price differential between cellophane and packaging papers, particularly glassine and waxed paper.[400] The objective of this effort has been to increase the use of cellophane. Each price reduction was intended to open up new uses for cellophane, and to attract new customers who had not used cellophane because of its price.[401]

136

The ratio between moistureproof cellophane prices and glassine prices, and between moistureproof cellophane and waxed paper prices, diminished during 1929–1949. In January 1929, the price of MT cellophane was seven times that of glassine; in June 1934, 4 times the price of glassine and 4¼ times the price of waxed paper. In January 1949, MST cellophane price was little more than twice that of glassine, and only twice that of waxed paper.[402]

137

Relationship between prices for various types of cellophane and prices for various types of glassine affects ability of the producers of the respective materials to sell their products.[403]

1464

138

DuPont's proportion of the United States production of flexible packaging materials has increased in almost direct relation to the steady decrease of the ratio of cellophane prices to glassine and waxed paper prices.[404]

139

Steady narrowing of price gap between cellophane and glassine and waxed paper enables duPont to get new marginal business from time to time, i. e., accounts who had previously not used cellophane because of its relatively high price compared to the price of waxed paper and glassine.[405]

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[400] Carpenter, Tr. 6277. GX 347, p. 869, 12/31/29. DX 337, p. 643, 12/11/24. DX 355, p. 670, 6/19/34. DX 327, p. 632, 11/20/39. DX 201, p. 415, 11/20/39.

[401] Yerkes, Tr. 6940–41. Carpenter, Tr. 6275–76. DX 344, p. 659, 5/29/28. DX 348, p. 663, 2/1/30. DX 354, p. 669, 5/14/34. DX 363, p. 679, 12/5/38. DX 367, p. 686, 11/27/40. GX 1483, p. 7051, 4/25/26. GX 347, pp. 866–69, 12/31/29. GX 483, p. 6412, 1/21/29. GX 490, p. 6499, 1/27/36. GX 6031, p. 8155, 2/7/39. See also DXs 355–365, pp. 641–83.

[402] DX 994 (Graph). Bricker, Tr. 4494–98.

[403] Nelson, DX 1020, pp. 317–18. Leinbach, Tr. 6779, 6782–83. Martin, Tr. 6379. R. R. Smith, Tr. 5674–5842.

[404] DX 982. DX 994.

[405] Carpenter, Tr. 6276–77. R. R. Smith, Tr. 5840–42. Horn, DX 1040, pp. 69–70. DX 344, p. 659, 5/29/28. DX 367, p. 686, 11/27/40.

140

Some users are sensitive to the cost of flexible packaging materials;[406] others are not.[407] Users to whom cost is important include substantial business: for example, General Foods, Armour, Curtiss Candy Co., and smaller users in the bread industry, cracker industry, and frozen food industry.[408] These customers are unwilling to use more cellophane because of its relatively high price,[409] would use more if the price were reduced,[410] and have increased their use as the price of cellophane has been reduced.[411]

1465 141

The cost factor slips accounts away from cellophane. This hits at the precarious users, whose profit margins on their products are low, and has been put in motion by competitive developments in the user's trade. Examples include the losses of business to glassine in candy bar wraps in the 30's,[412] frozen food business to waxed paper in the late 40's,[413] and recent losses to glassine in cracker packaging.[414]

142

The price of cellophane was reduced to expand the market for cellophane. DuPont did not reduce prices for cellophane with intent of monopolizing manufacture or with intent of suppressing competitors.[415]

143

DuPont reduced cellophane prices to enable sales to be made for new uses from which higher prices had excluded cellophane, and to expand sales. Reductions were made as sales volume and market conditions warranted. In determining price reductions, duPont considered relationship between its manufacturing costs and proposed prices, possible additional volume that might be gained by the price reduction, effect of price reduction upon the return duPont would obtain on its investment. It considered the effect its lowered price might have on the manufacture by others,

[406] R. R. Smith, Tr. 5677, 5800, 5815, 5817, 5841–42.
[407] Leinbach, Tr. 6763–70.
[408] Jakes, DX 1006, p. 10. Horn, DX 1010, pp. 69–70. Elmstrom, DX 1019, p. 280; DX 91, p. 209, 11/19/47. DX 120, p. 267, 1/26/49. DX 124, p. 272, 4/28/49. DX 125, p. 273, 1/21/49.
[409] McCurry, DX 1016, p. 224. DX 86, p. 201, 10/28/40. DX 93, p. 211, 11/17/47.
[410] Jakes, DX 1006, p. 10. DX 76, p. 173, 10/12/32. DX 125, p. 273, 1/21/49.
[411] Horn, DX 1010, pp. 69–70.
[412] R. R. Smith, Tr. 5771. DX 77, p. 174, 9/18/33. DX 86, p. 201, 10/28/40.
[413] R. R. Smith, Tr. 5819–11. Hanson, DX 1018, p. 251. Croy, DX 1021, p. 341. DX 120, p. 267, 1/26/49. DX 123, p. 271, 1/21/49. DX 124, p. 272, 4/28/49. DX 125, p. 273, 1/21/49. DX 126, p. 274, 2/7/49.
[414] R. R. Smith, Tr. 5804–05. DX 68, p. 151, 9/27/49.
[415] Yerkes, Tr. 6940–43. Carpenter, Tr. 6275–79. DX 337, p. 643, 12/11/24. GX 1483, p. 7049, 4/23/26. GX 347, p. 869, 12/37/29. DX 367, p. 686, 11/27/46.

but this possible result of a price reduction was never a motive for the reduction.[416]

1466 144

DuPont never lowered cellophane prices below cost, and never dropped cellophane prices temporarily to gain a competitive advantage.[417]

145

As duPont's manufacturing costs declined, 1924 to 1935, duPont reduced prices for cellophane.[418] When costs of raw materials increased subsequent to 1935, it postponed reductions until 1938 and 1939.[419] Subsequent increases in cost of raw material and labor brought about price increases after 1947.[420]

146

During period 1932–35, duPont made reductions in cellophane prices, but was unable to sell productive capacity of its cellophane plants.[421]

147

In May 1930, it made an announcement of a reduction and of further reductions to be effective in August and October.[422] DuPont's principal reasons for advance announcement were to influence consumers to use up their inventories rather than to place further orders, since new productive capacity was expected
1467 to come into operation in October, 1930, and to stimulate interest on the part of users who were not interested in cellophane at the current price but would be interested in anticipation of lower future prices. The advance announcement would give anyone contemplating cellophane manufacture notice of duPont's idea of the proper price level.[423] The price reductions made by duPont in August and October 1930 were greater than had been announced in advance.[424]

When a second advance announcement was suggested in 1936, management rejected the suggestion because business conditions

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[416] Yerkes, Tr. 6940–47. GX 347, p. 866, 12/31/29. DX 347, p. 662, 12/31/29. GX 465, p. 5941, 10/1/30. DX 352, p. 667, 12/31/32. DX 362, pp. 677–78, 6/17/38. DX 365, p. 683, 11/16/39. DX 367, p. 686, 11/27/40.

[417] Yerkes, Tr. 6943–44. DX 367, pp. 685–87, 11/27/40. GX 575 (Imp. Doc. No. 16), 8/11/47.

[418] GX 1, pp. 8–9, 2/17/44. GX 575 (Imp. Doc. No. 16), 8/11/47. DXs 338, 340, 341, 344, 345, 346, 348, 349, 350, 351, 353, 354, 357, 360, 361, 363, 364, 368.

[419] GX 492, p. 6551, 1/25/38. GX 355, p. 888, 8/30/38.

[420] DX 591, p. 1128, 1951. GX 501, p. 6895, 1/27/48.

[421] DX 598, p. 1214, 1951. DX 358, p. 673, 1951. GX 188, p. 526, 5/1/37 (Price chart). GX 1, p. , 2/17/44. GX 394, pp. 5481–82 (footnotes 1–2–3), 5/15/50. GX 393, p. 5476, 5/15/50. GX 395, p. 5488, 5/15/50.

[422] GX 477, p. 5991, 5/26/30.

[423] Yerkes, Tr. 6944–45. GX 462, p. 5935, 5/12/30.

[424] GX 463, p. 5937–38, 5/14/30. GX 477, p. 5991, 5/26/30. GX 478, p. 5992, 8/1/30. GX 479, p. 5993, 9/30/30.

which impelled the 1930 announcement did not exist; i. e., in 1936 customers were purchasing only for immediate use, and not to build up inventory.[425]

148

Same individuals were the principal duPont executives in duPont Rayon Co. and duPont Cellophane Co.[426] Same policies of improving quality, lowering cost of production, and reducing unit price to gain greater volume of sales were followed as to both companies.[427]

149

When duPont commenced manufacture of viscose rayon, it made a low percentage of the United States output, and for years its percentage of domestic sales was 20%. During that period its price policy for rayon was the same as for cellophane, which was the more the price could be reduced within limits the more of the article could be sold.[428]

1468 VII. Competition Between Cellophane and Other Flexible Packaging Materials

(Findings 150-278)

150

DuPont has promoted sale of cellophane for packaging material for products previously wrapped in other materials or not packaged. Growth of cellophane industry has been due to development of new uses, rather than an increase of volume in established uses.[429] The baking industry, the tobacco industry and the meat industry, each of which accounted for less than 2% of the small total sales in the early years, have become end uses of major importance, consuming millions of pounds annually.[430]

151

DuPont did not promote the sale of cellophane with intent of monopolizing the manufacture and sale of cellophane, or with intent of monopolizing the manufacture and sale of flexible packaging materials.[431]

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[425] GX 469, p. 5945, 9/15/36. GX 470, p. 5946, 9/17/36.
[426] Carpenter, Tr. 6265.
[427] Yerkes, Tr. 6947.
[428] Yerkes, Tr. 6945–47.
[429] GX 481, pp. 6367–68, 1/17/27. GX 482, pp. 6389–91, 1/13/28. GX 485, p. 6439, 1/22/31. GX 487, p. 6462, 1/23/33. GX 488, p. 6475, 1/22/34. GX 492, p. 6548, 4/25/38. GX 494, p. 6621, 1/18/40. GX 496, pp. 6765–66, 1/21/43. GX 499, p. 6858, 1/15/46.
[430] GX 460, p. 5915, 4/14/25. DX 409, p. 809, 2/9/50.
[431] Yerkes, Tr. 6938–43. Carpenter, Tr. 6275–78.

152

DuPont promoted use of cellophane under an idea of developmental sales. DuPont acted on belief to increase volume of cellophane sales it was necessary to promote it for uses where advantages to the user were sufficient to off-set the price advantage of competing flexible packaging materials. From selling standpoint, duPont's implementation of the developmental concept involved these activities:[432]

(a) Reduction of price per pound to reduce cost of cellophane.[433]

1469 (b) Development of packaging machinery and promotion of its use to reduce cost of application of cellophane.[434]

(c) Detailed study of the products and distribution practices of industries that appeared to be potential volume users, in order to determine what characteristics cellophane would require to function effectively, and to determine in what ways cellophane could justify its cost by increasing sales of product, reducing distribution costs for product.[435]

(d) Packaging development service to assist customers in designing practical packages with cellophane.[436]

(e) Technical services to assist customers in solving problems created by the use of cellophane.[437]

(f) Market studies to determine purchasing habits of retail consumers of packaged products.[438]

(g) Marketing studies to determine effect on sales of packaging a given product in cellophane.[439]

(h) Consumer advertising to popularize products packaged in cellophane.[440]

(i) Sales and technical assistance to converters engaged in the manufacture and sale of cellophane processed for packaging purposes.[441]

153

To increase use of cellophane duPont urged installation by customers of packaging machinery, wrapping and
1470 bag making machines. Use of such machines lowered cost of using cellophane, and tended to increase amount used.

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[432] R. R. Smith, Tr. 5651-5722.
[433] GX 431, pp. 5678-79, 4/26/29. GX 439, p. 5748, 7/28/32.
[434] GX 431, pp. 5678-79, 4/26/29.
[435] McCurry, DX 1016, pp. 211, 217. Elmstrom, DX 1019, p. 285. R. R. Smith, Tr. 5689.
[436] GX 431, p. 5678, 4/26/29. GX 493, p. 6582, 1/30/39.
[437] GX 431, pp. 5678-79, 4/26/29.
[438] Wilcox, DX 1013, p. 130. Goland, DX 1015, p. 189. McCurry, DX 1016, p. 211. R. R. Smith, Tr. 5717.
[439] McCurry, DX 1016, p. 213. R. R. Smith, Tr. 5721.
[440] GX 431, pp. 5678-79, 4/26/29.
[441] Goland, DX 1015, p. 188. Leeds, DX 1011, p. 84.

Purpose of such promotion by duPont of the use of packaging machinery was to lower the cost of packaging with cellophane and to enable cellophane to compete with other materials and to encourage use of cellophane by various types of customers.[442]

154

DuPont provided service to machine use of cellophane to users and prospective users without imposing obligation they purchase duPont cellophane, and without regard to size of possible purchases. Such services were rendered to persons using only Sylvania cellophane, to persons using both duPont and Sylvania cellophane, and to persons using no cellophane at all.[443]

155

Users of flexible packaging materials redesign packages seeking new ways of advertising their products, increasing protection or reducing cost. All manufacturers of such materials compete by rendering in varying degree technical services to these users including aid in package design,[444] development of material to meet special needs.[445]

156

DuPont considered as part of the future market for cellophane much of the business enjoyed by waxed paper and glassine. This is reflected in estimates by duPont of the potential for cellophane sales.[446]

1471 157

In uses which account for 75% of duPont cellophane sold (packaging in food industries, textiles, paper goods, tobacco products) cellophane competes with aluminum foil, cellulose acetate, Cry-O-Rap, greaseproof paper, glassine, Pliofilm, polyethylene film, Saran, sulphite paper, vegetable parchment and waxed paper. DuPont cellophane competes with waxed paper and glassine, and with one or more of the balance of these materials in every subdivision of the food industry.[447]

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[442] Russell, Tr. 6476, 6486. GX 455, p. 5888, 4/21/30. GX 435, p. 5728, 7/21/30. DX 410–[illegible]5.
[443] Russell, Tr. 6483–85.
[444] Jakes, DX 1006, p. 8. Nelson, DX 1020, p. 324. Leinbach, Tr 6772–73.
[445] Jakes DX 1006, pp. 15–16. Torrence, DX 1009, p. 44. Ellies, DX 1014, pp. 134–35, 137, 142. Nelson, DX 1020, p. 316. Leinbach, Tr. 6741–42.
[446] GX 6018, pp. 8056–57, 3/14/51. GX 6011, pp. 7963, 7968, 2/1/50.
[447] DX 409, p. 809, 2/9/50. DXs 984, 985, 986, 988–93. DX 996 (Physical Samples). GX 6004, pp. 7927–28. R. R. Smith, Tr. 5971. Nelson, DX 1020, pp. 303–[illegible]. [illegible], DX 1017, pp. 228–29.

158

Cellophane is forced to meet competition of other flexible packaging materials. The competition between the materials is intense and duPont cannot exercise market control or monopoly powers.

159

These are elements considered by users of flexible packaging materials in the selection of a material:

1. Type of protection the contents of the package will require, e. g., protection against dirt, handling, moisture transmission, flavor contamination, etc.[448]

2. Degree of protection required.[449]

3. Facility of materials that satisfy considerations to run on the type of machinery operated by the user of the material.[450]

1472 4. Degree of tradition of a certain package appearance. This must be judged by the user of the material against the nature of the market in which he sells his product.[451]

5. Degree of merchandising appeal.[452]

6. Economy offered by various materials. Both the selling price of materials and economies or expenses resulting from their use must be weighed.[453]

160

Packaging application presents problems arising from the nature of the product to be wrapped.[454]

161

Manufacturer of packageable products has a choice of materials from which to choose. Purchase price, cost of application, service available, and functional qualities of each material are factors which control choice, and control volume of material that can be sold in competition with others.[455]

162

Throughout the period of sale of cellophane, it has been at a price disadvantage as against flexible packaging materials of other kinds. Evidence is throughout the period of duPont manufacture

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[448] Jakes, DX 1006, pp. 5, 13. Horn, DX 1010, p. 68. Elmstrom, DX 1019, p. 279. McCurry, DX 1016, p. 212.

[449] Horn, DX 1010, p. 68.

[450] Jakes, DX 1006, p. 5.

[451] Horn, DX 1010, p. 69. Elmstrom, DX 1019, p. 277.

[452] Jakes, DX 1006, pp. 5, 13. Elmstrom, DX 1019, pp. 277–79.

[453] Jakes, DX 1006, p. 13. Horn, DX 1010, pp. 68–69. Elmstrom, DX 1019, pp. 278–80.

[454] Southwick, DX 1008, pp. 31–32. Hanson, DX 1018, p. 236. Ellis, DX 1014, pp. 154–55. R. R. Smith, Tr. 5561, 5688–5702, 5901. Martin, Tr. 6340–50.

[455] GX 589, p. 7532, 6/8/51. Jakes, DX 1006, pp. 5, 13. Horn, DX 1010, pp. 68–69. McCurry, DX 1016, p. 212. Elmstrom, DX 1019, pp. 277–80.

and sale of cellophane the price of cellophane, including
1473 both purchase price and cost of use, has been a factor in its competition with other flexible packaging materials.[456]

Evidence is throughout the period of duPont manufacture and sale of cellophane, it has competed with other flexible packaging

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[456] Specific cases of competition where price played an important role are noted, broken down by end uses, and subdivided by competing materials.

Baked Goods

Glassine: DX 18, pp. 30, 32–36, 4/28; DX 308, p. 594, 12/7/31. GX 438, p. 5760, 2/9/32. DX 27, p. 40, 2/26/32. DX 315, pp. 601–02, 5/4/32. DX 316, pp. 603–04, 6/8/32. GX 439, p. 5767, 7/28/32. DX 25, p. 14, 8/8/32. DX 317, p. 606, 8/10/32. DX 319, p. 608, 9/1/32. DX 320, p. 610, 10/32. DX 321, pp. 611–12, 11/4/32. GX 440, pp. 5770, 5774, 1/27/33. DX 35, p. 59, 2/7/33. DX 37, p. 61, 5/22/33. DX 39, p. 63, 9/25/33. DX 34, p. 58, 10/30/33. DX 41, p. 65, 11/15/33. DX 42, p. 66, 12/20/33. DX 50, p. 110, 7/22/39. DX 55, p. 128, 9/10/41. DX 65, 6/2/49. DX 70, p. 160, 10/49. McCurry, DX 1016, p. 242. R. R. Smith, Tr. 5686–87, 5791–95.

Pliofilm and polyethylene: DX 71, p. 164, 10/24/49.

Waxed paper: DX 18, p. 30, 4/28. DX 32, p. 56, 1/9/33. GX 440, p. 5774, 1/27/33. DX 35, p. 59, 2/7/33. DX 33, p. 57, 3/20/33. DX 36, p. 60, 5/3/33. DX 38, p. 62, 6/8/33. DX 131, p. 286, 8/15/33. DX 40, p. 64, 10/27/33. DX 42, p. 66, 12/20/33. R. R. Smith, Tr. 5695. DX 379, p. 709, 6/22/48. DX 64, p. 146, 6/2/49. DX 69, p. 152, 9/28/49. DX 71, p. 164, 10/24/49. DX 70, pp. 159–60, 10/49. McCurry, DX 1016, p. 210. R. R. Smith, Tr. 5686–87, 5696–99, 5777–80, 5791–95.

Chewing Gum, Candy and Nuts

General: DX 337, p. 643, 12/11/24. DX 74, p. 167, 8/31.

Glassine: DX 76, p. 173, 10/12/32. DX 320, p. 609, 10/32. DX 42, p. 66, 12/20/33. DX 85, pp. 199–200, 2/7/40. DX 86, pp. 201–02, 10/28/40. DX 88, pp. 205–06, 11/11/40. DX 93, p. 211, 11/17/47. DX 95, p. 213, 11/18/47. DX 97, p. 215, 6/48. Goland, DX 1015, p. 193. R. R. Smith, Tr. 5770–71.

Pliofilm: Jakes, DX 1006, p. 4.

Wax Paper: DX 42, p. 66, 12/20/33. R. R. Smith, Tr. 5781. Goland, DX 1015, p. 195.

Frozen Foods

Parchment: DX 111, p. 243, 3/9/39. DX 112, p. 244, 11/6/39. R. R. Smith, Tr. 5811.

Wax paper: DX 371, p. 693, 2/7/47. DX 436, p. 848, 6/22/49. DX 123, p. 271, 1/21/49. DX 124, p. 272, 4/28/49. DXs 125–28, pp. 273–77, 1949. DX 120, p. 267, 12/6/49. Crov, DX 121, p. 341. Hanson, DX 1018 p. 251. Horn, DX 1010, p. 72. R. R. Smith, Tr. 5809–11.

Snacks

Glassine: DX 152, p. 324, 2/49. McCurry, DX 1016, p. 209. R. R. Smith, Tr. 5815.

Pliofilm: DX 326, p. 630, 10/9/39. McCurry, DX 1016, p. 209.

Cereals

Glassine: DX 163, p. 337, 10/24/33. Horn, DX 1010, pp. 70–71.

Wax paper: DX 163, p. 337, 10/24/33. DX 164, p. 338, 1/21/41. R. R. Smith, Tr. 5817.

Meats

Greaseproof and parchment: DX 339, p. 648, 4/23/26. DX 320, p. 609, 10/32. DX 174, p. 355, 12/13/40.

Other Foods

Aluminum foil: DX 177, p. 360, 3/23/33.

Glassine: DX 339, p. 648, 4/23/26. DX 187, p. 376, 8/25/33. DX 178, p. 361, 8/13/47. Horn, DX 1010, p. 73. R. R. Smith, Tr. 5827.

Parchment: R. R. Smith, Tr. 5827.

Pliofilm: DX 172, p. 351, 10/27/48. DX 173, p. 352, 6/6/49.

Wax paper: DX 187, p. 376, 8/25/33.

Tobacco

Aluminum foil: DX 207, p. 427, 3/48.

Glassine: DX 339, p. 651, 4/23/26. DX 197, p. 407, 1/13/19. DX 198, p. 409, 4/12/39. DX 202, p. 417, 6/21/39. DX 203, p. 419, 11/3/39.

Wax paper: DX 200, p. 413, 4/25/39. DX 201, p. 415, 11/20/39.

Miscellaneous

Glassine: DX 219, p. 449, 5/8/31. DX 226, p. 458, 12/5/39. Leeds, DX 1011, p. 90.

Kraft paper: DX 224, p. 455, 3/30/31. DX 227, p. 459, 10/15/40.

Parchment: DX 321, p. 613, 11/4/32.

Pliofilm: DX 212, p. 439, 3/27/41. DX 230, p. 463, 12/12/49.

materials on the basis of the composite physical properties of each material and the degree of each such property.[457]

[457] Specific cases of competition between cellophane and other flexible packaging materials on the basis of composite physical properties and the degree of each are noted, broken down by end uses, and sub-divided by competing materials:

Baked Goods

Aluminum foil: DX 70, p. 158, 10/49.
Cellulose acetate: Hopping, DX 1007, p. 19.
Glassine: DX 11, p. 14, 5/19/27. DX 12, p. 15, 10/25/27. DX 18, p. 25, 4/28. DX 14, p. 18, 9/28/28. DX 15, p. 19, 9/29/28. DX 306, p. 587, 1/9/30. DX 308, p. 594, 12/7/31. GX 438, p. 5760, 2/9/32. DX 315, p. 601, 5/4/32. DX 316, p. 604, 6/8/32. DX 320, p. 609, 10/32. DX 322, p. 614, 12/8/32. GX 440, p. 5770, 1/27/33. DX 39, p. 63, 9/25/33. DX 43, pp. 67–73, 3/28/35. DX 47, pp. 84–94, 5/27/38. DX 48, pp. 95–104, 1/11/39. DX 53, pp. 125–26, 10/11/40. DX 49, pp. 105–109, 1/16/41. DX 57A, pp. 135–36, 6/14/45. DX 70, p. 158, 10/49. R. R. Smith, Tr. 5730.
Pliofilm: DX 51, pp. 111–18, 5/3/39. DX 326, p. 628, 10/9/39. DX 52, pp. 119–24, 1/17/40.
Wax paper: DX 12, p. 15, 10/25/27. DX 306, p. 587, 1/9/30. DX 24, p. 43, 10/16/31. DX 46, pp. 80–83, 5/15/36. DX 56, pp. 130–32, 11/24/41. DX 57A, pp. 137–38, 6/14/45. DX 66, p. 149, 6/2/49. DX 70, pp. 155, 159, 161, 10/49. DX 596, p. 1176, 1950. R. R. Smith, Tr. 5677–80, 5791–94.

Candy, Chewing Gum and Nuts

General: DX 74, p. 167, 8/31. DX 79, p. 181, 6/20/35. DX 82, p. 186, 12/15/39. Jakes, DX 1006, p. 11.
Aluminum foil: DX 80, pp. 182–83, 10/7/35. DX 89, p. 207, 2/25/41. DX 101, p. 219, 9/3/48.
Cellulose acetate: R. R. Smith, Tr. 5786–87.
Glassine: DX 78, pp. 175–80, 6/8/34. DX 88, pp. 205–06, 11/11/40. Leeds, DX 1011, p. 89. Jakes, DX 1006, pp. 2–3. Martin, Tr. 6381–82.
Pliofilm: DX 326, pp. 628, 630, 10/9/39. DX 84, pp. 188–98, 1/29/40. DX 87, pp. 203–04, 5/27/40. DX 98, p. 216, 12/23/47. Martin, Tr. 6384.
Wax paper: DX 304, p. 585, 1/13/28. Wilcox, DX 1013, p. 124.

Frozen Foods

Aluminum foil: DX 116, pp. 258–61, 9/48. DX 114, 246–49, 1/49.
Cry-O-Vac: DX 110, pp. 240–42, 11/16/39. Horn, DX 1010, p. 72.
Glassine: DX 106, pp. 225–28, 3/22/49. DX 108, p. 233, 7/21/31. DX 110, pp. 240–42, 11/16/39. DX 116, pp. 258–61, 9/48.
Parchment: DX 105, p. 224, 7/28/27. DX 106, pp. 225–28, 3/22/29. DX 110, p. 240–42, 11/16/39.
Pliofilm: DX 116, pp. 258–61, 9/48. DX 114, pp. 246–49, 1/49.
Polyethylene: DX 116, pp. 258–61, 9/48.
Wax paper: DX 106, pp. 225–28, 3/22/29. R. R. Smith, Tr. 5991. DX 109, pp. 234–39, 7/34. DX 119, pp. 265–66, 4/21/48. DX 116, pp. 258–61, 9/48. DX 123, p. 271, 1/21/49. DX 124, p. 272, 4/28/49. DX 114, pp. 246–49, 1/49. DX 596, p. 1176, 1950. Croy, DX 1021, pp. 341, 344. Hanson, DX 1018, pp. 251–54. Ramsay, DX 1017, p. 233. Tindal, DX 1012, p. 108. R. R. Smith, Tr. 5809.

Fresh Produce

Cellulose acetate: DX 331, p. 637, 1/6/47. DX 136, p. 291, 4/13/47. DX 135, p. 290, 7/47. DX 132, p. 287, 11/4/47. DX 133, p. 288, 12/4/47. DX 139, p. 298, 8/18/48. DX 137, pp. 291–96, 8/48. DX 140, p. 299, 12/7/48. DX 141, p. 300, 11/1/49. DX 144, pp. 303–05, 11/18/49. Goland, DX 1015, p. 192. Hopping, DX 1007, pp. 19, 22.
Pliofilm: DX 134, p. 289, 4/48. DX 138, p. 297, 7/22/48. DX 137, pp. 291–96, 8/48. Ellies, DX 1014, p. 138. Ramsay, DX 1017, pp. 238–39.
Polyethylene: Ramsay, DX 1017, pp. 238–39.

Snacks

Aluminum foil: DX 145, pp. 306–11, 12/28/36. DX 153, p. 125, 4/47. Martin, Tr. 6391–94. R. R. Smith, Tr. 5815.
Glassine: DX 149, pp. 319–20, 8/3/48. DX 150, p. 321, 9/10/48. DX 151, pp. 322–23, 12/13/48. DX 152, p. 324, 2/49. Martin, Tr. 6391–94.
Pliofilm: DX 326, p. 629, 10/9/39.

Cereal Products

Cellulose acetate: Hopping, DX 1007, p. 19.
Glassine: Horn, DX 1010, p. 71. Southwick, DX 1008, p. 32.
Pliofilm: DX 326, p. 630, 10/9/39.
Wax paper: Horn, DX 1010, pp. 70–71. Southwick, DX 1008, p. 32. R. R. Smith, Tr. 5817.

Footnotes continued on following page.

Throughout the period of duPont sale of cellophane, as
1476 result of operation of competitive factors as between duPont cellophane and other flexible packaging materials, duPont cellophane has gained part or all of the packaging
1477 business of certain specific accounts from other flexible packaging materials and vice versa. Evidence is shifts of business between duPont cellophane and other flexible pack-
1478 aging materials have been frequent, continuing and contested.[458]

Footnotes continued from preceding page.

Meats

Parchment: DX 316, p. 604, 6/8/32.
Pliofilm: DX 175, pp. 356–58, 8/40. DX 176, p. 359, 1/2/48. R. R. Smith, Tr. 5752. Ellies, DX 1014, pp. 138, 153.

Other Food Products

Aluminum foil: DX 169, pp. 343–345, 7/28. DX 182, p. 365, 9/19/39. DX 183, pp. 366–71, 4/22/40. DX 171, p. 350, 6/12/45. Elmstrom, DX 1019, pp. 278–79. Leeds, DX 1011, p. 90. Wilcox, DX 1013, pp. 122–24, 130.
Cellulose acetate: DX 154, p. 326, 3/31/41. DX 156, p. 329, 7/18/47. DX 167, p. 341, 1/13/48.
Glassine: DX 178, p. 361, 8/13/47. DX 179, p. 362, 8/5/48. DX 180, p. 363, 8/11/48.
Parchment: Elmstrom, DX 1019, pp. 278–79.
Pliofilm: DX 326, p. 629, 10/9/39. DX 165, p. 339, 10/2/47. DX 167, p. 341, 1/13/48. DX 166, p. 340 1/30/48. DX 169, pp. 343–45, 7/48. DX 173, p. 352, 6/6/49. DX 172, p. 351, 10/27/48. DX 436, pp. 851–52, 6/22/49. Ellies, DX 1014, pp. 141, 153. Leeds, DX 1011, p. 96. Wilcox, DX 1013, pp. 122, 125, 130.
Saran: DX 170, pp. 346–49, 12/49. Wilcox, DX 1013, p. 122.
Wax paper: DX 169, pp. 343–45, 7/48. DX 188, p. 378, 6/17/48. DX 181, p. 364, 12/23/48.

Tobacco

Aluminum foil: DX 194, p. 395, 7/16/37. DX 195, p. 398, 8/2/37. DX 196, p. 405, 5/3/38. DXs 205–08, pp. 424–34, 1948.
Glassine: DX 339, p. 651, 4/23/26. DX 307, p. 591, 5/14/30. DX 193, p. 385, 7/18/34. Leinbach, Tr. 6742–43. R. R. Smith, Tr. 5997–98.
Pliofilm: DX 326, p. 631, 10/9/39. DX 210, p. 436, 2/16/49. DX 209, pp. 434–435, 5/4/49.

Miscellaneous

Cellulose acetate: GX 441, p. 5781, 7/26/33. DX 225, p. 457, 11/8/39. Ramsay, DX 1017, p. 240. Hanson, DX 1018, p. 249.
Glassine: DX 221, p. 452, 1/19/49.
Pliofilm: DX 324, pp. 623–24, 9/16/38. DX 326, p. 628, 10/9/39. DX 212, p. 439, 3/27/41. DX 229, p. 462, 8/23/49. Leeds, DX 1011, p. 96. Ramsay, DX 1017, p. 239.
Polyethylene: Ramsay, DX 1017, p. 239.

[458] Specific cases of shifts of business between duPont cellophane and other flexible packaging materials are noted, broken down by end uses, and subdivided by competing materials:

Baked Goods

Cellulose acetate: DX 73, p. 166, 1/4/50.
Glassine: DX 18, p. 30, 4/28. DX 23, p. 41, 11/28/31. DX 309, p. 594, 12/4/31. GX 438, p. 5760, 2/9/32. DX 26, p. 45, 2/32. DX 27, p. 46, 2/26/32. DX 315, p. 601, 5/4/32. DX 316, pp. 603–04, 6–8–32. GX 439, p. 5767, 7/28/32. DX 318, p. 607, 8/10/32. DX 319, 608, 9/1/32. DX 320, p. 610, 10/32. DX 321, pp. 611–12, 11/4/32. GX 440, pp. 5770, 5774, 1/27/33. DX 39, p. 63, 9/25/33. DX 41, p. 65, 11/15/33. DX 55, p. 428, 9/10/41 McCurry, DX 1016, p. 208. Nelson, DX 1020, p. 316. Leeds, DX 1011, p. 89. Leinbach, Tr. 6757–58, 6767–68. R. R. Smith, Tr. 5705, 5715–16, 5730, 5794–95.
Wax paper: DX 24, p. 43, 10–16–31. McCurry, DX 1016, p. 205. GX 440, p. 5774, 1/27/33. DX 38, p. 62, 6/8/33. DX 40, p. 64, 10/27/33. R. R. Smith, Tr. 5709–10, 5696. DX 58, p. 137, 1/22/48. R. R. Smith, Tr. 5804. DX 59, p. 138, 6/4/48. DX 62, pp. 141–42, 2/21/49. DX 63, pp. 144–45, 4/11/49. DX 68, p. 151, 9/27/49. DX 73, p. 165, 1/4/50. Croy, DX 1021, p. 343. Leeds, DX 1011, p. 89. McCurry, DX 1016, pp. 209–10. Ramsay, DX 1017, p. 238. R. R. Smith, Tr. 5697–99, 5705, 5708–9, 5715–16, 5794–95, 5800–01. DX 60, p. 140, 5/17/48.

Footnotes continued on following page.

1479 165

1480 Identical consumer products of a producer are available on the market at the same time in different packaging mate-

Footnotes continued from preceding page.

Candy, Chewing Gum and Nuts

Aluminum foil: DX 81, pp. 184–85, 8/8/37. DX 99, p. 217, 6/10/48. DX 100, p. 218, 6/30/48. R. R. Smith, Tr. 5985, 6011. Jakes, DX 1006, p. 5. DX 101, p. 219, 9/3/48. Jakes, DX 1006, pp. 3–4. R. R. Smith, Tr. 5777–79. Martin, Tr. 6358–59.
Cellulose acetate: R. R. Smith, Tr. 5786–87.
Glassine: DX 92, p. 210, 2/10/32. DX 321, p. 612, 11/4/32. DX 94, p. 212, 7/25/33. DX 77, p. 174, 9/18/33. DX 93, p. 211, 11/17/47. DX 95, p. 213, 11/18/47. Jakes, DX 1006, pp. 1–2. R. R. Smith, Tr. 5771. DX 81, pp. 184–85, 3/8/37. DX 85, pp. 199–200, 2/7/40. DX 86, pp. 201–02, 10/28/40. Goland, DX 1015, p. 195. Jakes, DX 1006, pp. 3–4. Leeds, DX 1011, p. 89. R. R. Smith, Tr. 5772–73.
Pliofilm: DX 326, p. 628, 10/9/39. DX 98, p. 216, 12/23/47. DX 103, p. 222, 8/2/49. DX 104, p. 223, 8/23/49.
Sulphite: Wilcox, DX 1013, p. 125. Ramsay, DX 1017, p. 241.
Wax paper: DX 102, pp. 220–21, 1/7/49. Goland, DX 1015, p. 195. Jakes, DX 1006, p. 4. Wilcox, DX 1013, p. 124. R. R. Smith, Tr. 5781.

Frozen Foods

Cry-O-Vac: Horn, DX 1010, p. 72. DX 595, p. 1156, 1949. DX 129, p. 278, 11/14/49.
Parchment: Horn, DX 1010, p. 72. R. R. Smith, Tr. 5811–12.
Polyethylene: R. R. Smith, Tr. 5813.
Wax paper: R. R. Smith, Tr. 5807–11. DX 117, p. 262, 1/26/48. DX 118, pp. 263–64, 1/21/48. DX 119, pp. 265–66, 4/21/48. DX 120, p. 267, 1/26/49. DX 123, p. 271, 1/21/49. DX 124, p. 272, 4/28/49. DX 125–28, pp. 273–77, 1949. DX 436, p. 848, 6/22/49. Croy, DX 1021, pp. 340–42. Elmstrom, DX 1019, pp. 286–87. Hanson, DX 1018, p. 251. Ramsay, DX 1017, p. 233. Tindal, DX 1012, p. 108.

Fresh Produce

Cellulose acetate: DX 132, p. 287, 11/4/47. DX 133, p. 288, 12/4/47. DX 140, p. 299, 12/7/48. DX 141, p. 300, 11/1/49. DX 144, pp. 303–05, 11/18/49. Goland, DX 1015, p. 192. Hopping, DX 1007, p. 20. R. R. Smith, Tr. 5820.
Pliofilm: DX 593, pp. 1135–37, 1947. Ramsay, DX 1017, p. 238.
Polyethylene: Ramsay, DX 1017, p. 238.

Snacks

Glassine: DX 149, pp. 319–20, 8/3/48. Hanson, DX 1020, p. 322. McCurry, DX 1016, p. 209. Nelson, DX 1020, p. 316. Leinbach, Tr. 6767–68, 6778–79. R. R. Smith, Tr. 5816.

Cereals

Cellulose acetate: DX 158, pp. 331–32, 10/7/48.
Glassine: Horn, DX 1010, p. 71. Leinbach, Tr. 6764, 6767–68.
Wax paper: Horn, DX 1010, pp. 70–71.

Meats

Cry-O-Vac: Elmstrom, DX 1019, p. 273.
Glassine: Elmstrom, DX 1019, pp. 271, 273–75. R. R. Smith, Tr. 5734. Hanson, DX 1018, p. 250.
Greaseproof: Elmstrom, DX 1019, pp. 271, 275. R. R. Smith, Tr. 5734, 5739–41. Hanson, DX 1018, p. 259.
Parchment: DX 316, p. 604, 6/8/32. Elmstrom, DX 1019, pp. 271, 273, 275. R. R. Smith, Tr. 5734, 5739–41. Hanson, DX 1018, p. 250.
Pliofilm: DX 175, pp. 356–58, 8/40. DX 593, pp. 1135–37, 1947. DX 176, p. 359, 1/2/48. R. R. Smith, Tr. 5752, 5759, 5761.

Other Foods

Aluminum foil: DX 177, p. 360, 3/22/33. DX 182, p. 365, 9/19/39. Elmstrom, DX 1019, pp. 278–9. Leeds, DX 1011, p. 90. Wilcox, DX 1013, pp. 123–24.
Cellulose acetate: DX 156, p. 329, 7/18/47.
Glassine: DX 339, p. 648, 4/23/26. DX 178, p. 361, 8/13/47. DX 179, p. 362, 8/5/48. DX 180, p. 363, 8/11/48. Horn, DX 1010, p. 73.
Parchment: Elmstrom, DX 1019, pp. 278–79.
Pliofilm: DX 326, pp. 628–29, 10/9/39. DX 168, p. 342, 7/26/48. DX 172, p. 351, 10/27/48. DX 173, p. 352, 6/6/49. Ellies, DX 1014, p. 138.
Saran: DX 170, pp. 346–49, 1/2/49.
Wax paper: DX 181, p. 364, 12/23/48.

Footnotes continued on following page.

1481 rials. Illustrations of this situation in the market include products such as bread,[459] candy,[460] Campfire marshmallows,[461] M & M candies,[462] Beechnut gum,[463] Kleenex,[464] Armour's bacon,[465] General Food's coconut,[466] and varieties of National Biscuit Company's cookies.[467]

166

As cellophane sales increased it was useful in packaging operations of smaller companies. In 1950 duPont had 5,000 customers of which only 2% were large companies, such as national bakers, cigarette manufacturers, major meat packers, etc.[468]

167

Glassine[469] and waxed paper[470] are both made in a number of varieties. These types vary in transparency, opacity, moisture-proofness, price, gloss, and sealability. Additional varieties are engineered for specific customers on particular orders.[471]

168

Glassine offers a degree of transparency greatest per unit of cost of all packaging materials. Its degree of transparency is all that is needed and its cost is low.[472]

Footnotes continued from preceding page.

Tobacco

Aluminum foil: DX 194, p. 395, 7/16/37. GX 78, p. 271, 2/8/38. GX 79, p. 284, 2/9/39. DX 199, p. 411, 2/27/39. GX 425, p. 5653, 2/9/40. DX 205, p. 425, 2/4/48. Torrence, DX 1009, p. 43. R. R. Smith, Tr. 5824–26.

Glassine: DX 191, p. 381, 5/19/32. R. R. Smith, Tr. 5822, 5997–98. Leinbach, Tr. 6769–70, 6742–43. DX 197, p. 407, 1/13/39. DX 204, p. 420, 8/2/46. Nelson, DX 1020, p. 313.

Pliofilm: DX 326, p. 631, 10/9/39. DX 210, p. 436, 2/16/49. DX 209, pp. 434–35, 5/4/49.

Wax paper: Ramsay, DX 1017, p. 247.

Miscellaneous

Cellulose acetate: GX 441, p. 5781, 7/26/33. GX 443, p. 5799, 7/29/35. DX 225, p. 457, 11/8/39. GX 80, pp. 303–04, 2/9/40. Hanson, DX 1018, p. 249. Ramsay, DX 1017, p. 249.

Glassine: DX 222, p. 453, 5/5/49. Leeds, DX 1011, p. 90.

Kraft paper: DX 224, p. 455, 3/30/31.

Pliofilm: DX 324, pp. 623–24, 7/16/38. DX 325, p. 627, 11/1/38. DX 147, p. 317, 2/47. DX 216, p. 445, 2/21/49. DX 217, p. 446, 7/12/49. Ellies, DX 1014, p. 156. Leeds, DX 1011, p. 90. Ramsay, DX 1017, p. 239.

Polyethylene: Leeds, DX 1011, p. 90. Ramsay, DX 1017, p. 239.

Sulphite: Leeds, DX 1011, pp. 89–90.

Tissue: DX 214, p. 443, 1/26/48. DX 215, p. 444, 1/26/48.

[459] McCurry, DX 1016, pp. 209–10. Goland, DX 1015, pp. 194–95.
[460] Goland, DX 1015, p. 195. Horn, DX 1010, p. 71.
[461] Leinbach, Tr. 6756–57.
[462] Id., Tr. 6758, 6759.
[463] Id., Tr. 6761–62.
[464] Nelson, DX 1020, p. 305.
[465] Elmstrom, DX 1019, pp. 275–76.
[466] Horn, DX 1010, p. 72.
[467] McCurry, DX 1016, p. 206.
[468] GX 6002, pp. 8125–26, 6/8/51.
[469] Leinbach, Tr. 6740. Nelson, DX 1020, pp. 307–08. GX 6004, p. 7926.
[470] Ramsay, DX 1017, pp. 225, 243–44. Croy, DX 1021 1021, pp. 340, 344.
[471] Ramsay, DX 1017, pp. 225–26. Nelson, DX 1020, p. 308. Leinbach, Tr. 6741.
[472] GX 6004, p. 7926.

1482 169

Glassine and greaseproof compete with other wrapping and packaging materials. Cellophane is the product with which they compete directly.[473]

170

Glassine and greaseproof papers are sold on the ability of the different types to furnish protective packaging for various products. This is the same approach as that of selling moistureproof cellophane.[474]

171

Eye appeal in the flexible packaging business is any appearance that arrests the eye. It is not transparency and luster of the wrap. It is obtained by printing to achieve a colorful wrapper.[475]

172

From 1924, duPont engaged in developmental selling program for the bakery industry.[476] This work contributed to duPont's volume of sales to that industry, which has become its largest outlet. This creative selling involved:

(1) Invention of moistureproof cellophane, followed by development of a heat sealing type and of special types for different bakery products.[477]

(2) Work with bakeries and machinery manufacturers to modify wrapping machines to handle cellophane and service the use of cellophane on such machines.[478]

1483 (3) Development of standard formulae for sweet dough and promotion of manufacture of sweet dough goods by bakers.[479]

(4) Market research as to distribution of bakery products in retail stores and by house to house trucks.[480]

(5) Engineering work on mechanization of soft cake manufacture and on machines to wrap soft cake in cellophane or other wraps.[481]

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[473] Nelson, DX 1020, p. 304.
[474] GX 6004, pp. 7921–28.
[475] Leinbach, Tr. 6752. R. R. Smith, Tr. 5935–39. Martin, Tr. 6346, 6348. Torrence, DX 1009, pp. 42, 47. Horn, DX 1010, p. 76. Leeds, DX 1011, p. 94. Wilcox, DX 1013, pp. 129–30. Ellies, DX 1014, p. 153. Goland, DX 1015, p. 193. Ramsay, DX 1017, pp. 232–33. Hanson, DX 1018, pp. 253–54. Nelson, DX 1020, p. 322. Croy, DX 1021, pp. 343–344.
[476] See, e.g., GX 1483, p. 7049, 4/23/26.
[477] DX 47, p. 85, 5/7/38. Mitchell, Tr. 5512–16.
[478] R. R. Smith, Tr. 5683. Russell, Tr. 6477–78, 6480.
[479] R. R. Smith, Tr. 5711–18. GX 442, p. 5783, 1/23/34.
[480] R. R. Smith, Tr. 5688–93, 5718–22. DX 18, p. 24, 4/28.
[481] Russell, Tr. 6486–88.

(6) Studies of the characteristics of particular bakery products, such as doughnuts, to determine what characteristics cellophane must have to package them satisfactorily.[482]

(7) Comparative studies of the efficiency of cellophane, waxed paper and glassine as a wrap for bakery products.[483]

(8) Energetic customer by customer selling.[484]

SPECIFIC USES

1. White Bread

(Findings 173–189)

173

DuPont undertook promotion of cellophane for white bread in the early 1930's and has been selling cellophane for white bread since 1933.[485] It is used to some extent for that purpose in every section of the country.[486] DuPont's progress has been salesmanship rather than meeting spontaneous demand, since the dis-
1484 advantage of cellophane's higher initial cost over waxed paper must be overcome by sales arguments that emphasize its ability to increase sales and the hidden savings which result from its use.[487] In 1951 duPont sold between 8,000,000 and 9,000,000 pounds of cellophane for white bread.[488]

174

For packaging of white bread the wrapping material used besides moistureproof cellophane is waxed paper. Some waxed glassine is also used.[489] Waxed paper was being widely used for wrapping white bread when cellophane was first sold for this purpose.[490] Plain cellophane is not a satisfactory wrap for baked goods.[491]

175

Principal obstacle to be overcome by duPont in selling moistureproof cellophane for the packaging of white bread was its price in relation to waxed paper and glassine. Depending on how the

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[482] DX 7A, p. 9, 5/25/26. DX 11, p. 14, 5/19/27. DX 43, p. 68, 3/28/35. DX 44, p. 74, 3/17/36. DX 52, p. 119, 1/17/40.
[483] DX 47, p. 85, 5/27/38. DX 52, p. 119, 1/17/40.
[484] R. R. Smith, Tr. 5688–89.
[485] GX 6037, p. 8164, 1/28/49. DX 40, 10/27/33. R. R. Smith, Tr. 5677, 5684–85.
[486] GX 6307, p. 8165, 1/28/49.
[487] GX 6035, pp. 8160–61, 10/20/48.
[488] R. R. Smith, Tr. 5700.
[489] R. R. Smith, Tr. 5676. Ramsay, DX 1017, pp. 227–28, 237–38. McCurry, DX 1016, p. 210. DX 70, pp. 159–60, 10/49. GX 6035, pp. 8160–62, 10/28/40.
[490] R. R. Smith, Tr. 5676–77, 5685–86. GX 564, p. 8078, 8/31/49. GX 565, pp. 8088–89, 9/8/49.
[491] DX 388A, p. 719, 7/10/24. DX 389A, p. 721, 7/11/24.

materials were used, cellophane bread wraps cost in the early 1930's between three to five times the cost of waxed paper and from two and one-half to four times the cost of glassine. The low profit margin on white bread and the competition between bakers made the higher cost of cellophane a serious obstacle.[492]

176

A deterrent to use of cellophane by a white bread baker was the lack of wrapping equipment which could mechanically apply cellophane. To use cellophane the baker had to wrap it by hand which increased his costs, or convert existing equipment to handle cellophane, or invest as much as $3,000 in a new wrapping machine designed to handle cellophane as well as the papers.[493]

177

To minimize difficulty of wrapping white bread in cellophane on wrapping machines, duPont salesmen in the thirties made efforts at adapting bakers' installed wrapping machines to handle cellophane, by modifying the behavior of the machine by piano wire.[494] DuPont engineers contributed to the development of machines which would handle cellophane or waxed paper with equal efficiency by adjustment.[495]

178

Another deterrent to use of cellophane by a baker to wrap white bread was the inferior durability of cellophane and its tendency to shrink and break in dry or cold weather.[496]

179

One selling point made by duPont promoting its cellophane for use in the white bread trade was its moisture protection. Many bakers found waxed paper provided adequate protection against moisture during the 48 hour turnover period allotted to white bread and did not believe there was need for moistureproofness in any greater degree.[497]

180

In the thirties, duPont emphasized transparency of cellophane as a selling point. Many bakers believed glassine when wrapped

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[492] R. R. Smith, Tr. 5677, 5691. DX 40, p. 64, 10/27/33. DX 994 (Graph).
[493] R. R. Smith, Tr. 5678. Russell, Tr. 6479–80. DX 30, pp. 49–51, 1/5/33. DX 31, pp. 52–54, 1/27/33.
[494] R. R. Smith, Tr. 5683–84.
[495] Russell, Tr. 6479–80. DX 31, p. 52, 1/27/33.
[496] R. R. Smith, Tr. 5679, 5685.
[497] R. R. Smith, Tr. 5680–82. DX 72, pp. 163–64, 10/24/49.

closely about a loaf of bread was sufficiently transparent to
1486. enable their product to be inspected through the wrap. Others considered transparency a disadvantage.[498]

181

In the thirties white bread bakers were accustomed to the distinctive appearance of a bread wrap in their advertising. Waxed paper lent itself more readily than cellophane to the advertising practices of that trade.[499]

182

To sell cellophane to white bread bakers in the face of its disadvantages vis-a-vis waxed paper and glassine, duPont had to develop a sales method which minimized high price of cellophane. This method was to analyze distribution, production, selling costs of the baker and to associate suggested reductions in these costs with the use of higher priced cellophane.

DuPont salesmen would discover a baker who was a prospective customer, had an attenuated distribution route, and was making a low return because of high distribution costs per dollar of sale on that route. The salesmen would plan a rerouting for the baker in an effort to gain a greater volume of sale on a shorter distribution route, and tie it to the argument cellophane wraps on his white bread would gain for him a greater volume of sale on a shorter route. DuPont salesmen would find improper production methods in the baker's plant produced a high proportion of badly sealed waxed paper wrappers. These loaves could not be sold either because of the appearance of the unsealed wrap or because the loaf would get stale. DuPont salesmen would inspect the production methods, suggest methods to improve the sealing of the wraps, and seek to persuade the baker cellophane as the wrap would produce this greater efficiency and lower production cost.[500]

1487 183

DuPont's sales methods for promoting the use of cellophane for white bread met with success and white bread bakers were induced to use cellophane wraps for part or all of their white bread in lieu of the previously used waxed paper or glassine wraps. Many bakers switched to cellophane from waxed paper or glassine and then shifted back, having lost money either because the higher cost cellophane wraps did not increase their volume of sales or because the baker overestimated the amount of increase he could

[498] R. R. Smith, Tr. 5686. Martin, Tr. 6383.
[499] R. R. Smith, Tr. 5678–79.
[500] R. R. Smith, Tr. 5687–91.

get by using cellophane and lost money on large unsold production.[501]

184

White bread bakers shift from cellophane to waxed paper or glassine because of changes in the level of price of ingredients of bread: flour, sugar, shortening, etc. The profit margin in white bread can be reduced by rises in costs of these materials to a point at which the baker believes his return will increase if he shifts to a cheaper wrapping material. An example of this occurred in the mid-thirties when nearly every baker in northwest Pennsylvania discontinued the use of cellophane and reverted to waxed paper because of a 50–60¢ increase per barrel in the price of flour.[502]

185

A new promotion gains greater volume for one baker but tends to reduce volume of others. In many cases bakers whose business suffered, abandoned cellophane wrappers and reverted to waxed paper in order to prevent the loss of profit. This brought about losses of business for duPont.[503]

186.

Shifts of business between waxed paper and glassine and
1488 duPont cellophane for wrapping white bread have occurred from the early thirties up to the present. These shifts of packaging business have been caused by the operation of competitive factors stressing advantages and disadvantages of cellophane as against waxed paper and glassine, and by fluctuating emphasis, in the baking industry, upon cost savings.[504]

187

Cellophane is still at a price disadvantage to waxed paper and glassine.[505] Profit margins in the white bread trade are still low and ability of bakers to use cellophane and return a profit remains in a narrow range.[506] Machines have been developed, which will wrap automatically with cellophane at high speeds.[507] Improvement of process printing of waxed paper and in the opacity of waxed paper have made waxed paper a more commercially desira-

[501] R. R. Smith, Tr. 5692–95.
[502] R. R. Smith, Tr. 5696.
[503] R. R. Smith, Tr. 5694–97. DX 40, p. 64, 10/27/33.
[504] R. R. Smith, Tr. 5676–5702. See, e. g., DX 40, p. 64, 10/27/33.
[505] DX 379, p. 709, 6/22/48. DX 994 (Graph). R. R. Smith, Tr. 5686–87. McCurry, DX 1016, p. 210.
[506] McCurry, DX 1016, p. 210.
[507] R. R. Smith, Tr. 5687. Russell, Tr. 6480.

ble wrapper.[508] Improvements in the transparency of glassine and wax sulphite have narrowed this advantage cellophane once held over these wraps.[509]

188

DuPont has promoted sales of cellophane for wrapping white bread, except that during the period of cellophane shortage from 1941 through 1948, duPont did not attempt to increase the use of cellophane for this purpose. DuPont could not supply an industry-wide demand for cellophane for wrapping white bread and stated this to the baking trade and to converters who were active in promoting printed cellophane for white bread.[510]

1489

189

Sales methods used by duPont to sell cellophane to various trades for packaging of many different products are the same as those applied to the white bread trade. They are variations upon the central theme of attempting to persuade the individual customer cellophane packaging will increase sales of his product and his profits.[511]

2. Specialty Breads

(Findings 190–196)

190

Breads other than white, such as rye, whole wheat, raisin, etc. are known as specialty breads.[512] Flexible packaging materials used to wrap specialty breads are: Waxed paper, glassine, moisture-proof cellophane, and some aluminum foil.[513]

191

Prior to 1933–1934 no specialty bread was produced by wholesale bakers. DuPont, in order to provide a market for cellophane, promoted the development of specialty bread. DuPont urged production of specialty loaves by bakers, on the basis specialty loaves would be novel when introduced and could be changed to remain novel; that absence of standardization of specialty breads would permit each baker to set his own price and not have to meet

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[508] R. R. Smith, Tr. 5687.
[509] DX 53, p. 123, 10/11/40. Martin, Tr. 6381–82. R. R. Smith, Tr. 5713. Leimbach, Tr. 6773.
[510] Hanson, DX 1018, p. 265. GX 5594, p. 7903, 10/25/45. GX 582 (Imp. Doc. No. 18), pp. 3–4, 3/9/48.
[511] R. R. Smith, Tr. 5687–89, 5704–05, 5923–24, 5727–29, 5743–49.
[512] R. R. Smith, Tr. 5702. Ramsay, DX 1017, p. 237.
[513] R. R. Smith, Tr. 5703. DX 70, pp. 159–60, 10/49. McCurry, DX 1016, p. 209. Ramsay, DX 1017, p. 237. DX 1009–B, p. 59, 8/31/51.

the competition of a standard price and product, and specialty loaves marketed in cellophane would attain substantial volume and profit. The amount of cellophane sold for wrapping specialty bread increased from nil in the early thirties to its present volume, 15,700,000 pounds.[514]

1490 192

As sales of specialty breads increased, much of the volume of these breads was wrapped in waxed paper, glassine and aluminum foil.[515]

193

Advantages or disadvantages of cellophane as against waxed paper and glassine for the wrapping of specialty breads were much the same as in the case of white bread.[516]

194

Operation of advantages and disadvantages of cellophane as a wrap for specialty bread produced shifts of specialty bread bakers between cellophane and waxed paper or glassine, which have continued up to the present.[517] Considerable business duPont once built up for wrapping specialty bread in Oklahoma and Kansas has completely gone, and the bakers have gone back to waxed paper, seeking to increase their profit by cutting their costs.[518]

195

Some business on specialty breads lost by cellophane to wax paper and glassine has been regained, for example in the Minneapolis area. On the other hand, certain important bakers of specialty breads such as Pepperidge Farms have never used cellophane but always waxed paper.[519]

196

A proportion of the duPont cellophane sold for wrapping specialty bread is sold by converters to the bakers in printed form.[520]

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[514] R. R. Smith, Tr. 5704–05.
[515] R. R. Smith, Tr. 5705–97. Ramsay, DX 1017, p. 237. DX 56, p. 130, 11/24/41. DX 996 (Physical Samples). DX 1009–B, p. 57, 8/31/51.
[516] R. R. Smith, Tr. 5703. DX 25, p. 44, 8/8/32. DX 35, p. 59, 2/7/33. DX 58, p. 125, 10/11/40. DX 54, p. 127, 4/7/41.
[517] R. R. Smith, Tr. 5708–10. DX 54, p. 127, 4/7/41. DX 56, pp. 130–32, 11/24/41. DX 58, p. 137, 2/20/48. DX 73, p. 165, 1/4/50.
[518] R. R. Smith, Tr. 5708–10.
[519] R. R. Smith, Tr. 5709–10.
[520] R. R. Smith, Tr. 5710–11.

1491 3. CAKE AND SWEET GOODS

(Findings 197–204)

197

Flexible packaging materials used for wrapping cake are waxed paper, moistureproof cellophane, glassine, and cellulose acetate used as a window in paper board boxes. These materials are also used in the wrapping of "sweet goods" (coffee cakes, sweet rolls, and buns).[521]

198

In the early thirties sweet goods were not baked by wholesale bakers in any quantity. DuPont set about to create such a wholesale business as an outlet for cellophane. DuPont obtained for this purpose formulae for sweet dough and made an analysis of the market for wholesale sweet goods. DuPont sought to interest wholesale bakers in the considerable demand forecast for sweet goods, and made the formulae available to them. Result of this was the creation of a large wholesale sweet goods business and with it the creation of a considerable cellophane business for duPont.[522]

199

In spite of duPont's efforts to expand sales for packaging of baked sweet goods, it does not supply more than 50% of the packaging to this trade.[523] Of cellophane sold for sweet goods packaging, much is sold by duPont to converters, and sold to the bakers in converted form.[524] Almost all of the remainder of the flexible packaging in this field is glassine or waxed paper. Many bakers
1492 divide their packaging for sweet goods between cellophane and glassine and waxed paper, often using as much as three times as much glassine and waxed paper as cellophane.[525]

200

Principal factors adverse to duPont's sale of cellophane to wrap cake and sweet goods have been the higher cost of cellophane wrap as against wraps of other materials,[526] and improvement in transparency of glassine.[527]

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[521] R. R. Smith, Tr. 5711. DX 70, p. 158, 10/49.
[522] R. R. Smith, Tr. 5728–29.
[523] R. R. Smith, Tr. 5729.
[524] DX 54, p. 127, 4/7/41. DX 55, p. 128, 9/10/41. McCurry? DX 1016, p. 213.
[525] R. R. Smith, Tr. 5729. McCurry, DX 1016, p. 206. DX 53, p. 125, 10/11/40. Leinbach, Tr. 6757.
[526] R. R. Smith, Tr. 5712. DX 18, p. 36, April 1928. DX 27, p. 46, 2/26/32. DX 37, p. 61, 5/22/33. DX 38, p. 62, 6/8/33. DX 55, p. 28, 9/10/41.
[527] R. R. Smith, Tr. 5713. DX 53, p. 125, 8/30/40.

201

Operation of competitive factors in the baking industry enabled cellophane to take packaging business for sweet goods away from waxed paper and glassine, and has enabled the latter to take business from cellophane. These shifts have been frequent and are continuing.[528]

202

A number of large bakers of sweet goods never used cellophane, including the Tasty Baking Company in Philadelphia, the most successful cake baker in the United States.[529]

203

DuPont exerted efforts to develop a demand for cellophane in the house to house bakery business. Among these efforts was an analysis of selling methods used at the door by house to house bakery truck drivers. DuPont made a training motion picture for bakery salesmen, based upon these observations, which it made available to bakers. Many bakers who used the motion picture and accepted duPont's selling suggestions, do not use cello-
1493 phane, but use waxed paper, glassine and window boxes to package their products.[530]

204

A special doughnut film was developed to avoid the excessive condensation of moisture within the package and the consequent sogginess of the doughnut and dissolution of sugar coating. A special cake film was developed by duPont (MST–52) to eliminate shrinking and puckering of the previously used type of moisture-proof cellophane.[531]

4. Meat

(Findings 205–220)

205

Since 1924, duPont has sold cellophane to the meat industry.[532] The first use of cellophane in this industry was the wrapping of bacon, and other types of processed meats.[533] Processed meats

[528] R. R. Smith, Tr. 5711–15. DX 24, p. 43, 10/16/31. DX 26, p. 45, Jan.–Feb. 1932. DX 39, p. 63, 9/25/33. DX 55, p. 128, 9/10/41.
[529] R. R. Smith, Tr. 5716–17.
[530] R. R. Smith, Tr. 5719–22.
[531] R. R. Smith, Tr. 5730–31. DX 43, p. 68, 3/28/35. DX 44, p. 74, 3/17/36. DX 49, p. 105, 1/16/41. DX 408, p. 797. GX 6002, p. 8110, 6/8/51.
[532] R. R. Smith, Tr. 5732. GX 460, pp. 5908–09, 1/14/25.
[533] R. R. Smith, Tr. 5734, 5732. Elmstrom, DX 1019, pp. 271, 273, 275.

continued to be the area for the use of cellophane in the meat industry, until after World War II when cellophane packaging of fresh meat for self-service food markets reached substantial proportions.[534]

206

During the 1930's and ever since, other flexible packaging materials used to wrap types of processed meat products for which cellophane was used were: greaseproof paper, vegetable parchment, glassine, waxed paper, foil and Pliofilm. Most packaging of processed meats is done with those materials.[535]

1494 207

When duPont commenced to sell cellophane for packaging of processed meats, glassine, greaseproof paper and vegetable parchment were already being used in quantity and at lower cost, DuPont had to sell in the face of this price disadvantage. Every purchaser at every stage of meat distribution purchased at as low a figure as he could, and competition in the meat industry was that of price.[536]

208

When duPont was first selling an appreciable volume of cellophane to the meat industry, meat packers depended upon achieving a maximum volume of sale in order to keep a profit in the low price framework of the meat industry. Packers and wholesalers of meat had an insufficient profit margin to absorb the added cost of cellophane for processed meats, and had difficulty meeting prices of their competition if they passed the cost of cellophane along. Result was most meat packers and wholesalers could better achieve high volume of meat sales if they sold in unpackaged form or if their products were packaged in cheaper greaseproof paper, glassine, or parchment. Price disadvantage of cellophane in the meat industry was particularly severe.[537]

209

Prior to World War II, between 5 and 10% of baked and smoked meats were wrapped in duPont cellophane, at the peak of duPont's penetration of that business.[538] The pre-war peak was 1933 when duPont sold about two million pounds of cellophane

[534] R. R. Smith, Tr. 5743–51. DX 595, pp. 1150–51, 1948.
[535] R. R. Smith, Tr. 5734. Elmstrom, DX 1019, pp. 273–78. Torrence, DX 1009–B, p. 57. Ellies, DX 1014, pp. 135–38. Nelson, DX 1020, p. 314.
[536] R. R. Smith, Tr. 5737. Elmstrom, DX 1019, pp. 271–76. GX 460, pp. 5908–09, 1/14/25.
[537] R. R. Smith, Tr. 5737. Elmstrom, DX 1019, pp. 271–76, 279–80.
[538] R. R. Smith, Tr. 5739.

for packaging smoked and processed meats.[539] Thereafter duPont's business in this industry declined and did not again attain the 1933 volume until 1947.[540]

1495 210

DuPont was unable to hold its 1933 peak of cellophane business in the bacon and processed meat trade for these reasons: (1) Sylvania sold a sizeable quantity of second quality cellophane to the meat trade at a substantially reduced second quality price. DuPont did not sell second quality cellophane to this trade, and did not sell first quality material at a reduced price. DuPont also charged a higher price than Sylvania for shipments under 500 pounds. (2) Converters could make converted Sylvania film available to the meat trade at a lower price than the prices of converters who purchased from duPont. (3) The use was reduced around 1935 by the introduction of a bacon package of parchment or greaseproof paper. This so-called "Platter Pack" was cheaper than cellophane and was used for a time by nearly every bacon packer in the United States.[541]

211

During the mid-thirties duPont made a market study of the meat industry to discover opportunities for sales of cellophane. The cost emphasis of the meat industry's distribution system, lower prices of other flexible packaging materials and lower prices charged by Sylvania and its converters made duPont conclude there was no opportunity to expand sale of cellophane in that industry.[542]

212

The growth of duPont's cellophane sales to the meat industry from the low point of the mid-thirties to the present rate of 19,000,000 pounds annually is attributable to the rise of self-service refailing of fresh meat.[543]

1496 213

The growth of cellophane sales for wrapping self-service fresh meat did not commence until after World War II. Prior to that, obstacles to development of this outlet for cellophane were: (1) lack of a type of cellophane that would hold the color of red meat

[539] R. R. Smith, Tr. 5732–33.
[540] R. R. Smith, Tr. 5733–34.
[541] R. R. Smith, Tr. 5739–42.
[542] R. R. Smith, Tr. 5742.
[543] R. R. Smith, Tr. 5734, 5743. GX 6002, pp. 8116–17, 6/8/51. GX 595, pp. 1150–51, 1948. GX 596, p. 1170, 4/7/50.

for a 72 hour turnover period; (2) design and development of refrigeration cases for the display of packaged meats had received no attention from refrigerator companies; (3) consumers were bound by habit of butcher service, and there was no consumer acceptance of selling fresh meat by display and self-service of package cuts.[544]

214

DuPont experimented with wrapping fresh meat cuts in cellophane in cooperation with retail stores, and collected information from this work, on it to base improvements in the cellophane, refrigeration, and retailing. Self-service retailing of other types of food had increased by 1940, and self-service retailing experiments for fresh meat cuts wrapped in cellophane were successful at that time, though the refrigeration equipment was makeshift. In the early 1940's duPont developed a type of moistureproof cellophane specifically designed to hold the color of fresh meat for 72 hours, and enable it to be wrapped for self-service selling in retail stores. DuPont then induced retailing organizations to install equipment for testing this method of retailing meat, and cooperated with these organizations in training employees, designing installation, revising accounting procedures, achieving uniformity of cut. There are now 42,000 stores in the United States that sell fresh meat only by self-service, in packaged form. Prior to World War II, there were none.[545]

1497

215

Since acceptance of self-service retailing of fresh meat in packaged form, duPont has lost a considerable proportion of such packaging business to Goodyear's Pliofilm. Shifts of meat retailer's packaging business occur between duPont cellophane and Pliofilm continually, and Pliofilm is increasing its proportion of this packaging business. Specific retailing accounts, e. g., the A & P, Safeway, American Stores, have increased their proportionate use of Pliofilm, though they continue to use Pliofilm and duPont cellophane concurrently.[546]

216

Pliofilm's acceptance as a self-service meat wrap is attributable to certain characteristics: (1) It is tougher than cellophane. This reduces the cost to the retail store of rewrapping cuts on which the wrap has broken. (2) A single type of Pliofilm can be used

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[544] R. R. Smith, Tr. 5743–44.
[545] R. R. Smith, Tr. 5743–53. DX 172, p. 351, 10/27/48. DX 173, p. 352, 6/6/49.
[546] R. R. Smith, Tr. 5751–60. Ellies, DX 1014, pp. 137–38.

for red meat, luncheon meat, cheese, etc. as against three different types of cellophane. This makes the job simpler for the wrapping crew, and eliminates wrapping cheese or meat in the wrong type of film. (3) Cellophane used for wrapping fresh meat is coated on only one side. The coated side of cellophane must be kept away from the meat, or else the film will lose its protective properties and the meat will discolor. In the case of Pliofilm, either side may be wrapped next to the meat. This again makes for a simpler wrapping job and eliminates the cost of spoilage and rejects. The somewhat higher price of Pliofilm is offset by economies resulting from these physical characteristics.[547]

217

During the year 1951, the amount of Pliofilm used for self-service meat wraps was approximately 30 to 40% of
1498 the quantity of duPont cellophane used for the same purpose.[548]

218

Materials used today to package processed meats and bacon are: Saran, Cry-O-Rap, Pliofilm, cellulose acetate, polyethylene, greaseproof paper, cellophane, parchment, glassine, and waxed paper.[549] Most of the meat sold in the United States is sold through stores where meat is not on a self-service basis.[550] The use of greaseproof paper, waxed paper, and glassine for processed meats is heavy in these non-self-service stores.[551] There is acceptance in self-service stores of bacon packages made of paperboard and glassine, completely opaque.[552]

219

DuPont developed different types of moistureproof film in the early 1940's which had the correct degree of moistureproofness to enable luncheon meats and frankfurters to be packaged.[553] These items had never before been packaged because packaging materials then available had too much moistureproofness and turned the meat slimy, or else had too little moistureproofness and permitted it to become dried out.[554]

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[547] R. R. Smith, Tr. 5752–58. Southwick, DX 1008–A, p. 35. Ellies, DX 1014, pp. 137–38, 153.
[548] R. R. Smith, Tr. 5759–60.
[549] Martin, Tr. 6353. R. R. Smith, Tr. 5761–62. Nelson, DX 1020, p. 314. Ellies, DX 1014 pp. 135–38. Elmstrom, DX 1019, pp. 275–77.
[550] R. R. Smith, Tr. 5762.
[551] R. R. Smith, Tr. 5762.
[552] R. R. Smith, Tr. 5763.
[553] R. R. Smith, Tr. 5763–64. Elmstrom, DX 1019, pp. 288–89.
[554] R. R. Smith, Tr. 5751 5763–64. Elmstrom, DX 1019, pp. 288–89.

220

There is competition between converters for the business of converted wraps for meat and meat products. Armour and Company have purchased cellophane meat wraps from Daniels, Shellmar, Cellu-craft, Milprint, Inc., Traver Corporation, Standard Cap and Seal, Marathon Corporation, and Wraps, Inc.
1499 There is no uniform pattern of prices as between converters of any given type of wrap.[555]

5. Candy

(Findings 221–233)

221

Flexible packaging materials used for packaging by the candy industry are: Glassine, waxed paper, cellophane, greaseproof, aluminum foil, Pliofilm, cellulose acetate and polyethylene.[556]

222

40% or more of the production of the candy industry is accounted for by chocolate or chocolate coated candy bars.[557]

223

In the early thirties duPont was able to obtain a volume of business in cellophane candy bar wrappers. This business was in the form of printed wrappers. Most important brands of candy bars, in volume of business, were wrapped in duPont cellophane. These candy bars had previously been wrapped in glassine and duPont obtained this business by displacing the glassine wrap in favor of printed wraps of its own cellophane.[558]

224

Obstacles to sale of cellophane by duPont for use as candy bar wrappers have been: (1) higher price of cellophane as against glassine; (2) desirability in the candy bar trade of a highly printed "billboard" type of wrap; (3) transmission of light
1500 through a cellophane wrap tends to turn chocolate gray; (4) in the early days of duPont's candy bar wrap business,

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[555] Elmstrom, DX 1019, pp. 283–84. Leeds, DX 1011, pp. 87–88. Hanson, DX 1818, p. 250. GX 5047, p. 1430, 4/28/41.
[556] R. R. Smith, Tr. 5767. Martin, Tr. 6351. Horn, DX 1010, p. 71. Jakes, DX 1006, p. 8. DX 996 (Physical Samples).
[557] R. R. Smith, Tr. 5768. Jakes, DX 1006, p. 1.
[558] R. R. Smith, Tr. 5770., DX 92, p. 210, 2/10/32. DX 94, p. 212, 2/25/33. Jakes, DX 1006, p. 1.

wrapping machines were not available to handle cellophane, and cellophane wraps had to be applied by hand, adding greatly to the cost of production.[559]

225

DuPont was unable to maintain its early volume of candy bar wrap business, and the major brands of candy bars in the United States returned to printed glassine wrappers.[560] None of the major sellers in the candy bar field are wrapped in cellophane today although certain brands of candy bars are still wrapped in duPont cellophane, e. g., those made by the Elmer Candy Company of New Orleans, Donaldson Chocolate Company of Kansas City and General Foods Corporation of New York.[561] Gains and losses of candy bar business between duPont cellophane and glassine continue.[562]

226

In recent years duPont developed some cellophane business in the overwrap of cardboard trays containing a number of chocolate bars. These are sold in food stores as "take-home packages."[563]

227

Shifts of business occurred and still do between duPont cellophane and aluminum foil in segments of the candy industry. 1501. These include: (1) candy bars,[564] (2) seasonal specialties such as Easter candies and chocolate Easter eggs,[565] (3) mints,[566] (4) Lifesavers and other 5¢ packages.[567]

228

Moistureproof cellophane has displaced some waxed paper and vice versa in the wrapping of plastic types of candy such as kisses and caramels, and certain children's penny goods such as lollipops. Shifts of business are frequent.[568]

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[559] R. R. Smith, Tr. 5769–70. DX 76, p. 173, 6/12/32. DX 81, p. 184, 3/8/37. DX 86, p. 201, 10/28/40. DX 89, p. 207, 2/25/41. DX 91, p. 209, 11/5/47. DX 93, p. 211, 11/7/47. DX 95, p. 213, 11/18/47. DX 96, p. 214, 10/24/47.

[560] R. R. Smith, Tr. 5771, 5773. Jakes, DX 1006, pp. 1–2. DX 77, p. 174, 9/18/33. DX 86, p. 201, 10/28/40.

[561] R. R. Smith, Tr. 5771–73. Horn, DX 1010, p. 71. Jakes, DX 1006, p. 2.

[562] R. R. Smith, Tr. 5772–73.

[563] R. R. Smith, Tr. 5772. Jakes, DX 1006, p. 3. DX 103, p. 222, 8/2/49.

[564] R. R. Smith, Tr. 5775–80.

[565] R. R. Smith, Tr. 5777–79.

[566] R. R. Smith, Tr. 5779.

[567] DX 99, p. 217, 6/10/48. DX 100, p. 218, 8/20/48.

[568] R. R. Smith, Tr. 5780–81. DX 79, p. 181, 6/20/35. DX 90, p. 208, 11/15/46. Jakes, DX 1006, p. 4.

229

Manufacturers of this type of candy goods have frequently discontinued cellophane for a period because profits could not stand the higher price of the cellophane wrap.[569]

230

In the early years of duPont's efforts to sell cellophane for the low priced line of candy goods, kisses and caramels were individually wrapped by machine in waxed paper. Volume of this class of goods prohibited hand wrapping in cellophane, and this business was obtained by duPont only after development of wrapping machines that would handle cellophane.[570]

231

In 1938, duPont believed maximum volume of cellophane possible was being sold to the candy industry as it was then conducted, with no prospect of new uses for cellophane. It decided to attempt to increase the volume of cellophane sales to the candy industry. It found food stores provided the greatest hu-
1502 man traffic of any type of retailing outlet, and held the greatest promise as a new candy market. Since most food stores did not then carry candy, duPont made a market study of the kind of candy that would sell, the size of package that would sell, and the price at which it would sell in greatest volume. The price range of 19 to 29¢ per package was found to be promising. This range eliminated high priced box candy and indicated packages of cheaper types of candy were best prospects for home consumption. DuPont presented the results of this market study to candy manufacturers and to food stores, and recommended cellophane packaging for this type of unit. Sales of candy expanded as a result. This market development was largely responsible for the growth of duPont cellophane sales to the candy industry to the present figure of 20 million pounds annually.[571]

232

DuPont did not gain all of the food store business for candy packages. Glassine, aluminum foil, and cellulose acetate window boxes are all used to wrap types of candy sold in food stores.[572]

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[569] R. R. Smith, Tr. 5780–81. Jakes, DX 1096, pp. 4–5.
[570] R. R. Smith, Tr. 5780–81. DX 75, p. 171, 7/7/31. DX 79, p. 181, 6/29/35.
[571] R. R. Smith, Tr. 5782–87.
[572] R. R. Smith, Tr. 5786–87. Leinbach, Tr. 6758–59.

233

Moistureproof cellophane, Pliofilm, polyethylene, aluminum foil, and glassine are all used for packaging hard candies,[573] and business for this type of wrapping is lost and gained between each of these materials and cellophane.[574]

6. Crackers and Biscuits

(Findings 234–43)

234

The cracker and biscuit industry is divided into the sponge cracker trade and the sweet cracker trade. The
1503 former includes soda crackers such as Saltines and Ritz, and the latter includes sweet biscuits and crackers such as vanilla wafers, cookie sandwiches, ginger snaps.[575]

235

Since early 1930's some sweet crackers and biscuits have been packaged in moistureproof cellophane bags, and the majority in cartons lined with glassine or waxed paper and overwrapped with printed sulphite paper. Some cartons have been overwrapped in cellophane. DuPont has taken packaging business from other materials for certain cracker and biscuit accounts and has lost business back to these materials. Customers package part of their production of specific sweet goods in cellophane packages and the remainder of their production of the identical goods in other flexible packaging materials.[576]

236

In duPont's effort to sell cellophane for wrapping sweet crackers it encountered obstacles: (1) Cellophane cost the cracker and biscuit manufacturer more than glassine liners or sulphite carton overwraps. (2) Machines were in use for packaging with glassine, sulphite and cartons, but not with cellophane.[577] In this period (early 1930's) these factors limited duPont's sales for wrapping sweet crackers and biscuits to relatively high priced lines of goods.[578] Durability of cellophane was poor and frequency of

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[573] R. R. Smith, Tr. 5781, 5775. Jakes, DX 1006, p. 4.
[574] DX 101, p. 219, 9/3/48. Jakes, DX 1006, p. 4.
[575] R. R. Smith, Tr. 5788–91.
[576] R. R. Smith, Tr. 5789, 5791–95. McCurry, DX 1016, p. 206.
[577] R. R. Smith, Tr. 5791–92. McCurry, DX 1016, pp. 13–14. DX 32, p. 56, 1/9/33. DX 33, p. 57, 3/20/33. DX 34, p. 58, 10/30/33.
[578] R. R. Smith, Tr. 5792.

breakage of cellophane bags and overwraps of sweet cracker packages was high.[579]

237

Factors described caused loss of cellophane business for
1504 duPont to other flexible packaging materials. Some of this business has been regained. Cellophane is still at a price disadvantage; cellophane bags still must be filled by hand; the introduction of lithographing and process printing on sulphite and waxed paper has increased acceptance of those materials in the trade. All factors continue to cause losses of business for duPont in the cracker and biscuit industry, although some of it has been regained.[580]

238

To displace glassine, waxed papers and sulphite wrappers and liners on sweet goods, duPont made an effort to sell cellophane for the packaging of sweet crackers which were then sold in bulk, and displayed in large cartons known as caddies. These accounted for 65% of the sweet cracker business in 1931.[581] This type of selling was prevalent until 1938, at which time duPont had about two million pounds of business annually in cellophane overwraps and liners for sweet crackers and biscuits.[582] DuPont persuaded a substantial part of the cracker and biscuit industry and its retailing outlets to adopt display fixtures for sweet crackers and cookies to afford permanent display of these products and recommended cellophane packaging to promote display. Much of the sweet crackers previously sold in bulk were sold from these display fixtures.[583] When self-service food merchandise became general a few years later these display factors for crackers and biscuits remained as part of the self-service arrangement.[584] Today bulk selling of sweet crackers and biscuits has been eliminated, and cellophane bags, cellophane-wrapped trays, glassine lined trays overwrapped in Saran, printed and unprinted wax paper, sulphite, glassine, foil and Pliofilm are used to package consumer-size units.[585]

1505 239

Until 1947 duPont's sales of cellophane for the packaging of sponge crackers, i. e., soda crackers, saltines, etc., were limited to cracker carton overwraps. This business depended upon the

[579] R. R. Smith, Tr. 5792–93.
[580] R. R. Smith, Tr. 5794, 5798–99. McCurry, DX 1016, p. 206.
[581] R. R. Smith, Tr. 5791–92. DX 34, p. 58, 10/30/33.
[582] R. R. Smith, Tr. 5795.
[583] R. R. Smith, Tr. 5796–97.
[584] R. R. Smith, Tr. 5797–98.
[585] McCurry, DX 1016, pp. 206, 218–19, 221.

displacement of waxed paper overwraps.[586] Shifts of business have occurred back and forth for specific accounts such as Keebler-Weil Biscuit Company and Union Biscuit Company between duPont cellophane and waxed paper carton overwraps.[587]

240

In recent years development of process printing on waxed paper and improvements in waxed paper coatings have become factors in the overwrapping of cartons of sponge crackers and sweet biscuits.[588] DuPont has lost cellophane business in this trade to waxed paper for this reason.[589]

241

In 1947, duPont sold its first account for the use of cellophane for "fractional packaging" of sponge crackers.[590] Fractional packaging is the division of the contents of a carton into halves or quarters, each of which is separately wrapped, so that the opening of the carton exposes only a fraction of the contents.[591] DuPont tried unsuccessfully to get this method of packaging adopted for nearly twenty years prior to 1947.[592] At the present time about 26 cracker and biscuit bakers have a fractional packaged soda cracker on the market.[593] Other items such as graham crackers have been similarly packaged.[594] DuPont esti-
1506 mates about two million pounds annually of its cellophane goes into fractional packaging of crackers.[595]

The principal flexible packaging materials used for fractional packaging of crackers and biscuits are waxed glassine and waxed paper.[596] A small percentage of fractional packaging crackers and biscuits are wrapped in duPont cellophane. Certain individual cracker manufacturers use more waxed glassine for fractional packaging than duPont's total sales for that purpose.[597]

242

Profit margins are narrow and price competition intense in the sponge cracker business.[598] As any cracker manufacturer reduces

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[586] R. R. Smith, Tr. 5799–5802.
[587] R. R. Smith, Tr. 5801. DX 62, p. 141, 2/21/49. DX 63, pp. 144–45, 5/23/49. DX 64, pp. 146–47, 6/2/49.
[588] R. R. Smith, Tr. 5794, 5801.
[589] R. R. Smith, Tr. 5794–95, 5801. DX 62, pp. 141–42, 2/21/49. DX 63, pp. 143–44, 4/11/49. DX 64, pp. 145–46, 5/23/49.
[590] R. R. Smith, Tr. 5802.
[591] R. R. Smith, Tr. 5801–02. McCurry, DX 1016, p. 207.
[592] R. R. Smith, Tr. 5802.
[593] R. R. Smith, Tr. 5802–03.
[594] R. R. Smith, Tr. 5803.
[595] R. R. Smith, Tr. 5803.
[596] R. R. Smith, Tr. 5803. Leinbach, Tr. 6792. McCurry, DX 1016, p. 207.
[597] R. R. Smith, Tr. 5803–04.
[598] McCurry, DX 1016, pp. 207–08. Nelson, DX 1020, pp. 304–05, 321.

price others follow to remain competitive and give up cellophane for fractional packaging in favor of a cheaper material, e. g., a recent price reduction of National Biscuit Company forced a general reduction of saltine prices and duPont received cellophane order cancellations from several accounts.[599]

243

Certain cracker manufacturers began using glassine for fractional packaging during the postwar cellophane shortage because of the unavailability of cellophane. By April of 1952, when cellophane was in ample supply, those accounts had not been won over to cellophane.[600]

7. Frozen Foods

(Findings 244–250)

244

The frozen food and vegetable industry is of recent origin. In the early thirties when cellophane was first used
1507 on frozen food packages, Birdseye was the packer. A few additional concerns entered this business prior to World War II, but the industry grew slowly. During World War II the frozen food and vegetable packing business grew with emergence of dozens of major concerns, to a point at which it became one of the largest process food industries in the United States. Its growth is continuing.[601]

245

Cellophane is used in the frozen food industry for direct wraps or liners inside a carton, for carton overwraps and for direct wraps used alone. As a liner or direct wrap inside a carton it is used for frozen fish filets[602] and small consumer units off rozen fruits and vegetables.[603] It is used as an overwrap for cartons of frozen fruits and vegetables.[604] Cellophane is used as a direct wrap for frozen poultry.[605]

246

Cellophane has displaced some vegetable parchment as a direct wrap for frozen fish, and vice versa. Shifts of business continue between cellophane and parchment for this use.[606]

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[599] R. R. Smith, Tr. 5805.
[600] R. R. Smith, Tr. 5804. McCurry, DX 1016, p. 208.
[601] R. R. Smith, Tr. 5806–07.
[602] R. R. Smith, Tr. 5811. Horn, DX 1010, p. 72.
[603] Horn, DX 1010, p. 72.
[604] R. R. Smith, Tr. 5808–10.
[605] R. R. Smith, Tr. 5812.
[606] R. R. Smith, Tr. 5811. Martin, Tr. 6353. DX 111, p. 243, 3/9/39. DX 112, p. 244, 11/6/39. DX 122, pp. 269–70, 12/23/48. DX 174, p. 355, 12/13/40.

247

Waxed paper has displaced cellophane in some instances as a carton overwrap for frozen fish filets, and vice versa. Displacement continues back and forth in important fish packing accounts.[607]

1508

248

Birdseye (now a division of the General Foods Corporation) adopted cellophane on its frozen foods packages in the early thirties. For a period after that time duPont cellophane was used in 100% of the frozen food packages sold in the United States. To get this business duPont cellophane displaced waxed paper which Birdseye had previously used.[608] With growth of the frozen food industry during World War II converters of cellophane developed a highly attractive multi-colored process printed opaque cellophane carton overwrap which became widely accepted in the industry by such leaders as Libby McNeill and Libby, Dulany, Pictsweet and others,[609] displacing cellophane.

249

DuPont cellophane was once used to wrap 100% of frozen poultry. Displacement of much of this business has been effected by polyethylene, Pliofilm, and Cry-O-Rap. Among accounts who shifted to one of these films from cellophane for the wrapping of frozen poultry are the "Big 4" meat packers: Swift, Armour, Cudahy and Wilson.[610]

250

In the late 1940's, waxed paper manufacturers and converters developed waxed paper with a "hard wax" coating containing a polyethylene resin. This wrap is glossy, durable and resistant to moisture and liquids. It is a great deal cheaper than cellophane. Simultaneously converters developed process printing methods on this type of paper, which made a wrap of this material indistinguishable from printed cellophane. This wrap was widely
1509 accepted in the frozen food industry as a carton overwrap for fruits and vegetables, because of its low cost,[611] its ability to be handled at higher machine speeds than cellophane,[612] and for its great decorative[613] and protective qualities.[614] The polyethy-

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[607] R. R. Smith, Tr. 5811–12. DX 116, pp. 259–61, 9/48. DX 122, p. 270, 12/23/48. DX 119, p. 265, 1/21/48. DX 120, p. 267, 1/26/49.
[608] R. R. Smith, Tr. 5807.
[609] R. R. Smith, Tr. 5809. DX 115, p. 250, 11/46. DX 130, p. 285, 6/49. DX 996 (Physical Samples). DX 1003 (Shellmar Samples).
[610] R. R. Smith, Tr. 5812–13. DX 116, pp. 259–60, 9/48. DX 129, p. 278, 11/14/49.
[611] R. R. Smith, Tr. 5810–11. DXs 125–28, pp. 273–77. DXs 123–24, pp. 271–72.
[612] R. R. Smith, Tr. 5809. DX 118, p. 263, 1/21/48.
[613] R. R. Smith, Tr. 5810. DX 119, p. 265, 4/21/48.
[614] R. R. Smith, Tr. 5809. Ramsay, DX 1017, p. 233. DX 596, p. 1176, 4/7/50.

lene wax wrap has largely displaced cellophane in five of duPont's largest frozen food accounts.[615] DuPont is attempting to regain this business and still holds the business of certain other accounts of this type of wrap.[616]

8. Potato Chips, Pop Corn and Snacks

(Findings 251–253)

251

Flexible packaging materials used as wraps for potato chips, popcorn and cocktail snacks of various types are: waxed paper, glassine, aluminum foil, moistureproof cellophane, and Pliofilm.[617]

252

Cellophane has displaced other flexible packaging materials with certain accounts for packaging snacks and has been displaced by them in other cases. This displacement back and forth continues.[618]

253

Obstacles to sale of cellophane as wraps of bags for potato chips and other types of "snacks" have been: (1) higher price of
1510 cellophane over waxed paper and glassine; (2) passage of ultraviolet rays through cellophane which produces rancidity in the oils used in the packaged product. This latter obstacle has been particularly severe in the case of potato chips.[619] Aluminum foil does not permit the passage of any light, and waxed paper and waxed glassine can be made opaque to prohibit rancidity effect of ultraviolet rays.[620]

9. Cereals

(Findings 254–255)

254

Flexible packaging materials used as cereal wraps are glassine, waxed paper, and cellophane both as liners and overwraps.[621]

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[615] R. R. Smith, Tr. 5810–11. Horn, DX 1010, p. 72. Croy, DX 1021, pp. 340–41. Hanson, DX 1018, p. 251. DX 120, p. 267, 1/26/49.
[616] R. R. Smith, Tr. 5811.
[617] R. R. Smith, Tr. 5814. Martin, Tr. 6354–55. McCurry, DX 1016, p. 209. Ramsay, DX 1017, p. 228. Hanson, DX 1018, p. 248. Nelson, DX 1020, p. 305. DX 147, p. 315. DX 148, p. 318, 2/18/48. DX 996 (Physical Samples).
[618] R. R. Smith, Tr. 5816. McCurry, DX 1016, p. 209. Nelson, DX 1020, pp. 322–323. DX 150, p. 321, 9/10/48.
[619] R. R. Smith, Tr. 5815. DX 149, p. 319, 8/3/48.
[620] DX 145, p. 308, 2/28/36. Martin, Tr. 6391–94.
[621] R. R. Smith, Tr. 5816–17. Martin, Tr. 6351. Horn, DX 1010, pp. 70–71. Nelson, DX 1020, p. 310. DX 984. DX 985.

Aluminum foil is also used for packaging a small quantity of cereal.[622]

255

DuPont had little success in selling cellophane for use as a cereal package. Obstacles to the sale of cellophane as a cereal wrap have been: (1) higher price than waxed paper or waxed glassine; (2) major cereal producers found cellophane gave less satisfactory protection against either moisture or rancidity than did wax paper; (3) cellophane bags required more cumbersome filling methods; and they stacked poorly on display shelves.[623]

10. Fresh Produce

(Findings 256–258)

256

Flexible packaging materials used for packaging of fresh
1511 fruits and vegetables are cellophane, cellulose acetate, polyethylene, Pliofilm, glassine and parchment.[624] Acetate is used for the wrapping of spinach, tomatoes, and certain other green vegetables.[625] Polyethylene and Pliofilm are used for packaging vegetables and fruits in package sizes up to five or ten pounds.[626]

257

Cellophane has displaced cellulose acetate for the packaging of fresh produce such as spinach and tomatoes in some instances and cellulose acetate has displaced cellophane in others.[627] On the West Coast, cellulose acetate is used to package 100% of packaged spinach. On the East Coast it is not used in any quantity to package spinach.[628]

258

Certain types of fruits and vegetables are packed in consumer-size units by the grower in quantities in lieu of shipment in bulk and packaging by the retailer. In these cases cellophane has been displaced by polyethylene and Pliofilm. These durable materials are superior to cellophane for shipment at low temperatures for

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[622] Horn, DX 1010, pp. 70–71.
[623] R. R. Smith, Tr. 5816, 5817. Horn, DX 1010, pp. 70–71. DX 163, p. 337, 10/24/22.
[624] R. R. Smith, Tr. 5818. Martin, Tr. 6353. Ramsay, DX 1017, pp. 228–238. Hopping, DX 1007, p. 19. Ellies, DX 1014, pp. 136–37.
[625] R. R. Smith, Tr. 5820. DX 132, p. 287, 11/4/47. DX 133, p. 288, 12/4/47.
[626] R. R. Smith, Tr. 5820. Ramsay, DX 1017, p. 238.
[627] R. R. Smith, Tr. 5820. Hopping, DX 1007, p. 19, DX 563, p. 1093, 2/47. DX 132, p. 287, 11/4/47. DX 133, p. 288, 12/4/47. DX 140, p. 299, 12/7/48. DX 139, p. 298, 8/18/48. DX 141, p. 300, 11/1/49.
[628] R. R. Smith, Tr. 5820.

long distances, and for handling without breakage during long shipments. A shift from retail packaging by retailer or wholesaler to packaging by the grower frequently involves displacement of cellophane by polyethylene and Pliofilm. This development is taking place in the case of carrots and apples.[629]

1512 11. Paper Goods and Textiles

(Findings 259–260)

259

Flexible packaging materials used for wrapping paper goods (tissues, paper napkins, paper tablecloths, cups, etc.) are waxed paper, glassine, cellophane, sulphite, and cellulose acetate.[630]

260

Principal flexible packaging materials used to wrap textiles are cellophane, Pliofilm, polyethylene and glassine.[631] Obstacle to the sale of cellophane for wrapping of heavy textiles such as sheets, blankets and pillow cases is absorption of moisture by the hydroscopic textile in the package and eor equent shrinkage and breakage of the cellophane wrap as it dries out. Polyethylene and Pliofilm combine a higher degree of toughness with less tendency to shrink, and have found increasing acceptance for the wrapping of heavy textiles, displacing much cellophane.[632]

12. Cigarettes

(Finding 261)

261

Cellophane was first accepted as an overwrap for cigarette paper-foil package for novel appearance, lending itself to a large advertising campaign.[633] Glassine had been used.[634] Since general acceptance of cellophane as a cigarette package overwrap, there have been periods of its displacement: a period of cellophane shortage in the mid-forties, and merchandising experiments
1513 of the Brown and Williamson Tobacco Company who, for a period, sold Kools and Raleigh cigarettes in a one-piece

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[629] R. R. Smith, Tr. 5820–21. Ramsay, DX 1017, p. 238. DX 562, pp. 1083–87, 10/46.

[630] R. R. Smith, Tr. 5821. Hopping, DX 1007, p. 19. DX 219, p. 449, 5/8/31. DX 221, p. 452, 7/19/49. DX 222, p. 453, 5/5/49. DX 984.

[631] R. R. Smith, Tr. 5821–22. Ramsay, DX 1017, p. 228. DX 996.

[632] Ramsay, DX 1017, p. 239. Hanson, DX 1018, p. 249. DX 212, p. 439, 3/27/41. DX 216, 217, pp. 445–46, 2/21/49, 7/12/49.

[633] R. R. Smith, Tr. 5997.

[634] R. R. Smith, Tr. 5 '2. Leinbach, Tr. 6769.

foil package.[635] Manufacturers of Pliofilm, glassine and aluminum foil have made and continue to make determined efforts to displace cellophane as a wrap for cigarettes.[636]

13. Butter

(Finding 262)

262

DuPont in the mid-thirties made a selling effort in the butter industry. This met with no success, since butter in contact with cellophane tended to separate the coating, and because the butter industry could not pass the higher cost of the cellophane wrap on to dealer. DuPont is attempting to sell cellophane as a butter wrap. Vegetable parchment and aluminum foil have been and are the materials used as a direct wrap for butter.[637]

14. Chewing Gum

(Findings 263–264)

263

Flexible packaging materials used for the packaging of chewing gum are: aluminum foil, waxed paper, cellophane, laminations of aluminum foil and waxed paper, and laminations of aluminum foil to cellophane or to waxed paper. These materials carry a variety of printed effects and coatings.[638]

264

Chewing gum packages are shifting to an opaque outer wrapper.[639] This opacity is achieved by a solid overprinting
1514 of cellophane film and in other instances by using opaque foil or paper. Producers of foil, waxed paper and cellophane have attempted to promote package designs upon converters and chewing gum manufacturers which utilize a maximum of their material.[640] Increase of one material is at the expense of another.[641]

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[635] R. R. Smith, Tr. 5824–25. DX 265, p. 424, 12/2/46. DX 206, p. 425, 2/4/48.
[636] Leinbach, Tr. 6769–70. Ellies, DX 1014, pp. 139–41. DX 593, pp. 1136–37, 1946.
[637] R. R. Smith, Tr. 5828. Martin, Tr. 6380. Elmstrom, DX 1019, pp. 278–79. DX 996 (Physical Samples).
[638] Martin, Tr. 6352, 6358–59. Leinbach, Tr. 6761–62. Jakes, DX 1006, pp. 3–4. Ramsay, DX 1017, pp. 228, 240–41. Nelson, DX 1020, p. 311.
[639] Leinbach, Tr. 6744. Ramsay, DX 1017, pp. 240–41.
[640] Leinbach, Tr. 6761–62.
[641] Martin, Tr. 6385. Leinbach, Tr. 6743–44. Ramsay, DX 1017, pp. 16–17.

15. Other Food Products

(Findings 265–273)

265

Other food products on which cellophane is used as a packaging material are: powdered drink mixes, macaroni, noodles, rice, dried fruits, dried vegetables, cheese, cake mixes, sandwiches. For each of these products other flexible packaging materials are used. In each case duPont must sell against a physical property of another packaging material, against lower cost of another material, or against both.[642]

266

Noodles and macaroni have been sold in cellophane bags, Pliofilm, paper wraps and window boxes.[643] Cellophane bags have been displaced by specific accounts wholly or in part by window boxes.[644] Many accounts prefer window boxes because of lower breakage, and because of their more regular shape and facility of use on display counters.[645]

267

Dried fruits are packaged in blocks wrapped in Saran film, moistureproof cellophane or Pliofilm, and in cartons over-
1515 wrapped with waxed paper,[646] and sometimes lined with glassine or greaseproof paper.[647]

268

Shifts of specific accounts between cellophane and other flexible packaging materials have occurred and now occur for the packaging of dried fruits.[648] DuPont's business in this end use was gained from glassine.[649]

269

Saran film is preferred by dried fruit packers to cellophane for its superior moistureproofness, although Saran is more costly.[650] Pliofilm is preferred by many for the soft appearance it imparts to the contents of the package.[651] Cellophane costs less than either

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[642] Martin, Tr. 6352–55. DX 155, p. 328, 11/6/47. DX 180, p. 363, 8/11/48. DX 188, p. 378, 6/17/48. DX 183, p. 366, 5/40. DX 984. GX 6004, pp. 7926-28.
[643] Martin, Tr. 6354, DX 155, p. 328, 11/6/47. DX 155 (ibid). DX 156, p. 329, 7/18/47.
[644] DX 155 (ibid). DX 156 (ibid).
[645] DX 156 (ibid). Martin, Tr. 6354.
[646] Ellies, DX 1014, p. 138. DX 165, p. 339, 10/2/47. DX 166, p. 340, 1/30/48. DX 169, pp. 343–45, July 1948. DX 170, pp 346–49, Dec. 1949.
[647] Martin, Tr. 6354.
[648] DX 167, p. 341, 1/13/48. DX 168, p. 342, 7/26/48. DX 165, p. 339, 10/2/47. Ellies. DX 1014, pp. 137, 138-139.
[649] DX 339, p. 648, 4/23/26.
[650] DX 170, p. 346. McCurry, DX 1016, p. 211. Ellies, DX 1014, p. 138.
[651] Ellies, DX 1014, pp. 138–39, 153–54. DX 168, p. 342, 7/26/48.

Pliofilm or Saran film and is preferred by many packers for that reason.[652]

270

DuPont developed a Saran coated cellophane film "K–202" in order to provide the dried fruit trade with a film that can compete with Saran and Pliofilm in moisture resistance.[653] K–202 is also used for wrapping certain types of cookies and other products that absorb moisture readily.[654]

271

Rice is packaged in cartons, paper bags, cellophane bags and window boxes. Shifts of business for packaging of rice have occurred between duPont cellophane and various forms of rice packaging.[655]

1516

272

Dried vegetables are packaged in laminated foil, Pliofilm, Pliofilm and paper laminations, cellophane, cellophane and paper laminations, depending upon degree of transparency desired, degree of protection against moisture required, display conditions, and other factors of choice.[656]

273

Powdered mixes including cake mixes, dessert mixes, and beverage mixes have been packaged in foil, foil and paper laminations, cellophane pouches, glassine pouches, cartons lined with a glassine bag, and glassine laminations.[657] Some accounts have displaced cellophane for powdered mixes because of the moisture resistance of foil or a glassine,[658] others because of the breakage of cellophane.[659] These are factors against which duPont must sell for that use.

16. Other Tobacco Products

(Findings 274–275)

274

Aluminum foil and moistureproof cellophane are both used for the wrapping of individual cigars. Both afford protection

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[652] Leeds, DX 1011, pp. 92, 96. Elmstrom, DX 1019, p. 288. McCurry, DX 1016, p. 211. DX 168, p. 342, 7/26/48.
[653] Mitchell, Tr. 5519–20. GX 396, p. 5492, 5/15/50. GX 6002, p. 8110, 6/8/51.
[654] Mitchell, Tr. 5519.
[655] Martin, Tr. 6355. DX 157, p. 330, 3/16/49. DX 158, p. 331, 10/7/48. DX 159, p. 333, 12/6/48. DX 160, p. 334, 12/9/49. DX 161, p. 335, 8/31/48. DX 162, p. 336, 8/19/49.
[656] Martin, Tr. 6532. DX 984. DX 985.
[657] DX 180, p. 363, 8/11/48. DX 182, p. 365, 9/19/39. DX 1009–B, p. 57, 8/31/51. DX 984.
[658] DX 180, p. 363. DX 182, p. 365, 9/19/39.
[659] DX 184, pp. 372–73, 7/1/42. DX 185, p. 374, 8/18/42. DX 186, p. 375, 4/23/42.

against moisture loss of the cigar, and accounts have been gained and lost by duPont cellophane from and to aluminum foil.[660]

1517 275

Glassine, waxed paper, sulphite and cellophane have been used for packaging of smoking and chewing tobacco.[661] Major obstacles to sale of cellophane for this use is its high cost in relation to cost of waxed paper and glassine, and the superior production facility of glassine and waxed paper on wrapping machines. Accounts have been regained and lost by cellophane from and to these materials. Recently Pliofilm has been adopted on some tobacco packages for its lack of shrinkage and consequently the superior appearance of the package.[662]

17. Cheese

(Findings 276–277)

276

Flexible packaging materials used for the packaging of cheese include: cellophane, a converted cellophane coated with a rubber wax compound, Pliofilm, glassine, aluminum foil, lead foil and Saran.[663]

277

Processed cheese was once wrapped in tin foil or in aluminum foil but this wrap has been displaced by a rubber coated opaque cellophane cheese wrap.[664] American cheese is wrapped in Pliofilm, Saran or cellophane.[665] Swiss cheese is generally wrapped in transparent cellophane.[666] Cream cheese and Camembert cheese are generally wrapped in aluminum foil. Cellophane has
1518 been tried for the wrapping of cream cheese and Camembert but has been displaced by aluminum foil.[667]

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[660] DX 194, p. 395, 7/16/37. DX 199, p. 411, 2/27/39. DX 1009–B, p. 59, 8/31/51. DX 596, p. 1181, 4/7/50.

[661] DX 198, pp. 408–09, 4/12/39. DX 202, p. 417, 6/21/39. DX 203, p. 419, 11/3/39. DX 200, p. 413, 4/25/39. Ramsay, DX 1017, p. 241.

[662] Ellies, DX 1014, p. 136. DX 210, p. 436, 1/12/49.

[663] Martin, Tr. 6532. Wilcox, DX 1013, p. 121. Hanson, DX 1018, p. 251. Elmstrom, DX 1019, p. 275. Croy, DX 1021, p. 334. DX 984 (Physical samples). DX 171, p. 350, 6/12/45. DX 172, p. 351, 10/27/48. DX 173, pp. 352–53, 6/6/49.

[664] Wilcox, DX 1013, p. 123. Elmstrom, DX 1019, p. 275. Croy, DX 1021, p. 334.

[665] Wilcox, DX 1013, p. 122.

[666] Wilcox, DX 1013, p. 122.

[667] Wilcox, DX 1013, p. 123. Torrence, DX 1009, p. 43.

18. Oleomargarine

(Finding 278)

278

Oleomargarine is wrapped in aluminum foil, greaseproof, and vegetable parchment applied directly about the quarter pound bars. Aluminum foil dominates.[668] Recently printed cellophane has been adopted on certain brands for a full pound overwrap. DuPont had attempted to gain acceptance of this wrap for years and has succeeded only in 1952.[669]

VIII. Results of duPont's Competition With Other Materials

(Findings 279–292)

279

During the period duPont entered the flexible packaging business, and since its introduction of moistureproof cellophane, sales of cellophane have increased.[670] Total volume of flexible packaging materials used in the United States has also increased.[671] DuPont's relative percentage of the packaging business has grown[672] as a result of its research, price, sales and capacity policies,[673] but duPont cellophane even in uses where it has competed has not attained the bulk of the business, due to competition of other flexible packaging materials.[674]

280

Of the production and imports of flexible packaging materials in 1949 measured in wrapping surface, duPont
1519 cellophane accounted for less than 20% of flexible packaging materials consumed in the United States in that year. The figures on this are:[675]

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[668] Martin, Tr. 6353–54. Torrence, DX 1009, 43–44. Wilcox, DX 1013, p. 125. Hanson, DX 1018, pp. 248–49. DX 996 (Physical Samples).
[669] R. R. Smith, Tr. 6002.
[670] DX 536, p. 992. DX 537, p. 993.
[672] DX 981.
[672] DX 981.
[673] Yerkes, Tr. 6940–42. DX 367, p. 686, 11/27/40. DX 369, p. 689, 1944.
[674] DX 984. DX 989. DX 990. DX 991. DX 992. DX 993.
[675] DX 982. Bricker, Tr. 4433–43.

	Thousands of square yards
Glassine, greaseproof and vegetable parchment papers	3,125,826
Waxing papers (18 pounds and over)	4,614,685
Sulphite bag and wrapping papers	1,788,615
Aluminum foil	1,317,807
Cellophane	3,366,068
Cellulose acetate	133,982
Pliofilm, Polyethylene, Saran and Cry-O-Rap	373,871
Total	14,720,854
Total duPont cellophane production	2,629,747
DuPont cellophane percent of total United States production and imports of these flexible packaging materials	17.9%

281

80% of cellophane made by duPont is sold for packaging in the food industry. Of this quantity, 80% is sold for packaging baked goods, meat, candy, crackers and biscuits, frozen foods, fresh vegetables and produce, potato chips, and "snacks", such as peanut butter sandwiches, popcorn, etc. A small amount is sold for wrapping of textiles and paper products, etc. Largest non-food use of cellophane is the overwrapping of cigarette packages.

The breakdown of duPont cellophane sales for the year 1949 was:[676]

1520. Use	Sales (thousand pounds)	Percent of total sales
Tobacco:		
Cigarettes	20,584	11.6
Cigars	3,195	1.8
Other tobacco	1,657	0.9
Total	25,436	14.3
Food products:		
Candy and gum	17,054	9.6
Bread and cake	40,081	22.5
Crackers and biscuits	12,614	7.1
Meat	11,596	6.5
Noodles and macaroni	2,602	1.5
Tea and coffee	1,380	0.8
Cereals	2,487	1.4
Frozen foods	5,234	2.9
Dried fruit	333	0.2
Nuts	2,946	1.7
Popcorn and potato chips	6,929	3.9
Dairy products	3,808	2.1
Fresh produce	4,564	2.6
Unclassified foods	8,750	4.9
Total	120,478	67.7
Miscellaneous:		
Hosiery	1,370	0.7
Textiles	3,141	1.8
Drugs	1,031	0.6
Rubber	317	0.2
Paper	2,736	1.5
Unclassified	18,602	10.5
Total	27,197	15.3
Domestic total	173,011	97.3
Export	4,820	2.7
Grand total	177,831	100.0

[676] DX 409, p. 809, 2/9/50. R. R. Smith, Tr. 5671. See also DX 595, p. 1158, 1949.

1521 282

Sales of cellophane by duPont in 1951, by principal uses, were approximately as follows:

		Pounds
White bread	between 2,000,000 and [677]	9,000,000
Specialty breads	[678]	15, 700, 000
Cake and other baked sweet goods	[679]	22, 000, 000
Meat	[680]	19, 000, 000
Candy (including chewing gum)	[681]	20, 000, 000
Crackers and biscuits	[682]	17, 000, 000
Frozen foods	[683]	5, 800, 000
Cigarettes	[684]	23, 000, 000

283

1949 sales of 19 major representative converters whose business covered a substantial segment of the total converting of flexible packaging materials for that year showed the following as to their sales of flexible packaging materials, classified by end use: [685]

1522 End use	Quantity (million square inches)	Percent of of total end use
Bakery products:		
Cellophane [686]	109,670	6.8
Foil	2,652	.2
Glassine	72,216	4.4
Papers	1,440,413	88.6
Films	215	.0
	1,625,166	100.0
Candy:		
Cellophane	134,280	24.4
Foil	178,967	32.5
Glassine	117,634	21.4
Papers	119,102	21.6
Films	484	.1
	550,467	100.0
Snacks:		
Cellophane	61,250	31.9
Foil	1,571	.8
Glassine	120,556	62.8
Papers	8,439	4.4
Films	79	.1
	191,895	100.0
Meat and poultry:		
Cellophane	59,016	34.9
Foil	88	.1
Glassine	4,524	2.7
Papers	97,255	57.5
Films	8,173	4.8
	169,056	100.0

[677] R. R. Smith, Tr. 5700.
[678] Id. 5710.
[679] Id. 5718.
[680] Id. 5731.
[681] Id. 5765.
[682] Id. 5787.
[683] Id. 5805.
[684] Id. 5822.
[685] DX 984. Bricker, Tr. 4470–88, 4530–31, 4536–37. Croy, DX 1021, p. 347
[686] This includes all cellophane, not merely duPont cellophane.

End use	Quantity (millions square inches)	Percent of total end use
Crackers and biscuits:		
Cellophane	29,960	26.6
Foil	192	.2
Glassine	11,253	10.0
Papers	71,147	63.2
Films	8	.0
1523	112,560	100.0
Fresh produce:		
Cellophane	52,828	47.2
Foil	43	.1
Glassine	96	.1
Papers	51,035	45.6
Films	7,867	7.0
	111,869	100.0
Frozen food excluding dairy products:		
Cellophane	31,684	33.6
Foil	629	.7
Glassine	1,943	2.1
Papers	56,925	60.3
Films	3,154	3.3
	94,335	100.0

284

About 96% of packaged white bread produced in the United States is wrapped in waxed paper or glassine, and about 6% in cellophane. The cellophane figure includes sales by all U. S. producers.[687]

285

48% of specialty breads are wrapped in duPont cellophane, the remainder in other cellophane or other materials.[688] Most of this balance is wrapped in waxed paper and glassine.[689]

286

Approximately 45% of cake and baked sweet goods packaged by wholesale bakers is wrapped in duPont cellophane.
1524 The balance is wrapped in other cellophane or in waxed paper or glassine.[690]

287

Between 25 and 35% of packaged candy units sold in the United States are wrapped in duPont cellophane.[691]

[687] R. R. Smith, Tr. 5701-2.
[688] R. R. Smith, Tr. 5710.
[689] R. R. Smith, Tr. 5702-03.
[690] R. R. Smith, Tr. 5718.
[691] R. R. Smith, Tr. 5782.

288

Of sponge and sweet crackers and biscuits combined approximately 25% to 30% of the packaged units produced in 1951 were wrapped in duPont cellophane.[692]

289

DuPont cellophane at the present time is used on approximately 20 to 20% of packaged retail units of frozen foods.[693] The remainder use waxed paper, waxed glassine, polyethylene, Pliofilm, Cry-O-Vac, or vegetable parchment.[694]

290

Approximately 20 to 30% of packages of potato chips and other snacks are wrapped in duPont cellophane. Most of the remainder are packaged in glassine and other flexible wraps.[695]

291

Approximately 4 to 6% of the packaged units of cereal are wrapped in duPont cellophane.[696] The principal flexible packaging materials used are waxed paper and glassine.[697]

292

DuPont cellophane is used as an outer wrap on the paper-foil packages for approximately 75 to 80% of cigarettes sold in the United States.[698] Sales for this use represent about 11.6% of duPont's total sales of cellophane.[699]

1525 IX. DuPont Competed With Sylvania

(Findings 293–330)

293

Competition existed between duPont and Sylvania, and later Olin, for the sale of cellophane. Many customers have shifted back and forth between the producers, or divided their purchases between producers in changing proportions. Illustrative examples of such shifts in business are:

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[692] R. R. Smith, Tr. 5805.
[693] R. R. Smith, Tr. 5813–14.
[694] Id. 5806.
[695] R. R. Smith, Tr. 5814–15.
[696] R. R. Smith, Tr. 5816–17.
[697] Martin, Tr. 6351. DX 984.
[698] R. R. Smith, Tr. 5823.
[699] DX 409, p. 809, 2/9/50.

1930 GX 435, p. 5729, 7/21/30.
GX 436, pp. 5741–42, 1/27/31.
1931 GX 437, p. 5751, 7/28/31.
GX 438, p. 5761, 2/9/32.
1932 GX 439, p. 5766, 7/28/32.
DX 29, p. 48, 1/1/32.
DX 539, pp. 995–98, 8/25/32.
GX 440, p. 5774, 1/27/3.
1933 DX77, p. 174, 9/18/33.
DX 584, p. 1118, 5/22/33.
GX 442, p. 5784, 1/23/34.
1934 GX 443, pp. 5794–5801, 1/29/35.
DX 543, p. 1004–35, 1935.
1935 GX 76, pp. 237–40, 243, 2/11/36.
GX 77, p. 261, 2/10/36.
GX 78, p. 270, 1938.
1936 GX 78, pp. 272–73, 1938.
GX 444, p. 5809–18, 2/9/37.
1937 GX 78, pp. 270–75, 1938.
1938 GX 79, p. 280, 2/9/39.
GX 80, p. 295, 2/9/40.
GX 493, pp. 6577, 6582, 1/20/39.
GX 5517, pp. 629–95, 9/19/38.
1939 GX 80, pp. 295–300, 2/9/40.
1940 GX 81, pp. 305–08, 1941.
GX 5040, p. 4526, 7/19/40.
1526 DX 85, pp. 199–200, 2/7/40.
DX 582, p. 1115, 6/20/40.
DX 86, pp. 201–02, 10/28/40.
GX 82, pp. 312–13, 1942.
1941 GX 82, pp. 312–13, 1942.
GX 495, p. 6657.
1946 DX 562, pp. 1083–87, 10/46.
1947 DX 132, p. 287, 9/8/47.
DX 155, p. 328, 11/6/47.
DX 156, p. 329, 7/18/47.
DX 563, pp. 1088–92, 2/47.
1948 DX 122, pp. 269–70, 12/33/48.
DX 208, p. 433, 6/25/48.
DX 435, p. 845, 5/17/48.
1949 DX 102, p. 220, 1/7/49.
DX 141, p. 300, 5/19/49.
DX 209, p. 435, 5/4/49.

General: R. R. Smith, Tr. 5835–37.

294

Comparative dollar volume of sales of plain cellophane by duPont and Sylvania in illustrative years is as follows: [700]

Year	DuPont	Sylvania
1932	$5,052,442	$1,916,449
1935	5,126,685	2,131,884
1938	5,907,989	2,547,850
1941	8,960,865	4,029,240
1947	7,741,573	2,093,250
1950	9,330,776	2,674,961

295

Comparative dollar volume of sales of moistureproof cellophane by duPont and Sylvania in illustrative years is as follows: [701]

1527 Year	DuPont	Sylvania
1932	$10,325,539	$1,091,158
1935	13,581,480	3,906,913
1938	19,667,671	6,284,401
1941	31,013,706	8,799,764
1944	34,350,852	10,671,004
1947	47,598,053	14,388,668
1950	89,850,415	26,809,793

296

DuPont sales of cellophane increased or decreased from year to year at rates different from those at which Sylvania sales increased or decreased. The rate of increase (or decrease) of sales for each company for illustrative years over the respective preceding year is as follows: [702]

Year	DuPont	Sylvania
1933	19.6	36.8
1935	11.0	26.7
1938	1.8	14.0
1941	28.3	23.9
1943	11.0	(9.0)
1946	11.3	19.0
1947	24.1	10.6
1949	10.8	8.1
1950	13.8	29.7

297

DuPont and Sylvania acting independently of each other have increased production during the history of their operations. In

[700] DX 536, p. 992.
[701] DX 536, p. 993.
[702] DX 537, p. 993.

1931, duPont produced 24,619,988 pounds of cellophane while in 1950 it produced 202,826,066 pounds. Sylvania increased its production from 3,751,151 pounds in 1931 to 59,845,816 pounds in 1950. Following tables indicate production of each company during the period 1924–1950, together with relative and changing rates of growth of production.[703]

	DuPont		Sylvania	
	Pounds	Percent increase or (decrease) from previous year	Pounds	Percent increase or (decrease) from previous year
1924	361,249			
1925	944,441	161.4		
1926	1,910,286	102.3		
1927	1,889,599	(1.1)	Sylvania began production in 1930.	
1928	3,181,069	68.3		
1929	6,056,128	90.4		
1930	14,804,941	144.5	Not available	
1931	24,619,988	66.3	3,751,151	
1932	27,008,687	9.7	7,032,089	87.5
1933	33,962,048	25.7	8,366,602	19.0
1934	39,357,997	15.9	11,212,407	34.0
1935	43,807,451	11.3	13,788,529	23.0
1936	55,593,780	26.9	19,999,655	45.0
1937	61,021,870	9.8	20,690,482	3.5
1938	61,386,582	0.6	21,291,072	2.9
1939	74,147,443	20.8	25,860,639	21.5
1940	81,676,848	10.2	29,142,503	12.7
1941	106,349,907	30.2	34,351,301	17.9
1942	87,099,471	(18.1)	30,498,388	(11.2)
1943	97,651,419	12.1	30,079,593	(1.4)
1944	94,350,906	(3.4)	29,238,796	(2.8)
1945	96,401,673	2.2	30,612,355	4.7
1946	107,185,838	11.2	35,516,404	16.0
1947	133,502,858	24.6	41,046,308	15.6
1948	160,616,693	20.3	46,679,266	13.7
1949	178,666,169	11.2	50,171,066	7.5
1950	202,826,066	13.5	59,845,816	19.3

298

Sylvania's competition has been strong. It took business from duPont in some of the largest accounts. Without exception, Sylvania attempted to sell duPont's customers and *vice versa*.[704]

299

DuPont competed with Sylvania but never sought to suppress it. Yet it never held back from developing new business in order to leave it for Sylvania.[705]

1529 300

Sylvania's customers included large and small organizations. Among its important customers were Reynolds Tobacco Company,

[703] DX 600, p. 1246.
[704] R. R. Smith, Tr. 5835–37. GX 6020, p. 8094, 4/10/50.
[705] R. R. Smith, Tr. 5835–38. Yerkes, Tr. 6957. Reichel, Tr. 6047–48.

American Tobacco Company, P. Lorillard, Ward Baking Company, Great Atlantic & Pacific Tea Company, and Quality Bakers of America.[706]

301

No proof was presented duPont excluded Sylvania from the cigarette industry.

302

Sylvania prospered during 1930–40 when duPont was making price reductions.[707]

303

Sylvania and duPont competed for the business of converters. Sylvania since 1930 had adequate converters.[708] Plaintiff conceded the number of converters sold by Sylvania kept pace with the number sold by duPont.[709] Converter sales have been an important proportion of Sylvania's business, in 1947 and 1948 approximating 40% of total sales.[710] Instances of the competition for business of converters are:

(1) American Paper Goods, duPont's first converter, began using Sylvania cellophane in 1930,[711] and in 1935 began purchasing Sylvania cellophane exclusively.[712]

(2) U. S. Envelope Co. shifted from duPont to Sylvania in 1934.[713]

1530 (3) In 1940 duPont's first two converters, American Paper Goods Co. (1925) and Alexander Hurtz (1926) purchased ten times as much cellophane from Sylvania as from duPont.[714]

(4) From 1942 to 1947 Shellmar and Dobeckmun were among Sylvania's ten most important converter customers.[715]

(5) Sylvania sold to 45 converters in 1935, 53 in 1940, 63 in 1945 and 93 in 1948.[716]

304

In its existence, Sylvania has expanded its productive capacity to the extent of its financial resources.[717] Its growth has been substantial.[718]

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[706] GX 414, pp. 5616–17. GX 79, pp. 283–84, 1938.
[707] GX 414, p. 5615. Reichel, Tr. 6040–42.
[708] Reichel, Tr. 6048.
[709] Minieus, Tr. 1729.
[710] GX 414, p. 5615.
[711] GX 436, p. 5745, 1/27/31.
[712] GX 77, p. 261, 2/11/36.
[713] GX 5001, pp. 4419–20, 1934.
[714] GX 5046, p. 4555, 11/5/40.
[715] GX 414, pp. 5619–20.
[716] GX 414, p. 5618.
[717] Reichel, Tr. 6040–41.
[718] DX 536, p. 992. DX 537, p. 993. DX 538, p. 994.

305

Sylvania has conducted its cellophane operations at a profit.[719] Its Board of Directors approved plans to expand its capacity to 100,000,000 pounds and these plans are advanced.[720]

306

Sylvania was able to sell its cellophane output and expanded its productive capacity as fast as it could afford. It was not easy to borrow money during the 1930's. Sylvania borrowed a million dollars in 1938.[721]

307

During the 1930's Sylvania used part of its earnings to enter manufacture of viscose caps, artificial horse hair, viscose
1531 staple fiber, sausage casings, rubber thread, and textile finishes. Of these only the sausage casing venture was successful. Use of its funds for these projects limited Sylvania's funds available for expansion of its cellophane capacity.[722]

308

During the period 1931–1950, inclusive, duPont produced and sold 75% of the total amount of cellophane manufactured in the United States in the twenty years and Sylvania about 25%. In the individual years this ratio rarely varied more than 1% or 2%. During this period annual production in the United States expanded from 28,000,000 lbs. to 263,000,000 lbs. Each company's expansion of sales was achieved by its own efforts, and similarity of proportions of the total business sold by the two companies during this expansion was not the result of any agreement or understanding.[723] Business of each company increased and decreased with particular customers, and for particular products; and the rate of growth of the two companies varied from year to year.[724]

309

DuPont was able to gain the greater share of the cellophane business because of efficiency as a manufacturer, the superior quality of duPont cellophane, and value to its customers of its creative merchandising and technical service.[725]

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[719] Reichel, Tr. 6049. DX 538, p. 994.
[720] Reichel, Tr. 6049. GX 410, p. 5602.
[721] Reichel, Tr. 6040–41
[722] Reichel, Tr. 6041–42.
[723] GX 531A, p. 7326.
[724] DX 537, p 999.
[725] GX 79, p. 281, 1938. Martin, Tr. 6361–62, 6399. Jakes, DX 1006, pp. 6–7. Wilcox, DX 1013, pp. 127–28, 130–31. McCurry, DX 1016, pp. 216, 217, Hanson, DX 1018, pp. 264, et seq.

310

Vigorous competition existed between duPont and Sylvania on the basis of quality. This competition included the devel-
1532 opment of types of moistureproof film [726] with characteristics adapting to particular products, as well as the quality of each type.[727] Shifts of business continually took place as result of such competition.[728]

311

DuPont manufactures a wider variety of specialized types of moistureproof cellophane than does Sylvania. This is an advantage to a converter, since the variety gives a complete line of wraps adapted for particular applications.[729]

312

Quality of duPont cellophane has improved over the years. Quality improvements have been a factor in the purchase of duPont cellophane by customers as opposed to Sylvania cellophane and other packaging materials.[730]

313

DuPont and Sylvania engaged in competition on the basis of quality for business in the cigar trade. Shifts of business of particular customers resulted from this competition.[731] Soon after duPont's introduction of moistureproof cellophane in 1930, most cigars shifted to a moistureproof cellophane wrap. Commencing in 1932, Sylvania made increasing gains in sales to the cigar industry because of the preference of customers for the characteristics of its cigar film.[732] By 1935 Sylvania's sales to the cigar industry were over 40% of all cellophane sold to that industry.[733] To compete, duPont engaged in research to
1533 improve its cellophane in the qualities desired by customers.[734] A new type was sold commencing by 1935, but was not able to recapture much business from Sylvania.[735] Further research which resulted in a further improved type sold commer-

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[726] DX 342, p. 657, 5/15/28. DX 346, p. 661, 8/1/29. DX 308, p. 740.
[727] DX 543, pp. 1008–09, 1010–11, 1934. DX 548, p. 1047, 6/23/38.
[728] DX 539, p. 995, 7/25/32. GX 77, p. 250, 2/10/36. GX 78, p. 266, 2/2/38. GX 79, p. 288, 2/9/39.
[729] Leeds, DX 1011, p. 82.
[730] Martin, Tr. 6452–53. Jakes, DX 1006, pp. 9/11. Leeds, DX 1011, pp. 87–88, 93. Wilcox, DX 1013, p. 127. Ellies, DX 1014, p. 138. Hanson, DX 1018, p. 254. Elmstrom, DX 1019, pp. 288–89. Nelson, DX 1020, pp. 316–17.
[731] GX 435, p. 5728, 1930. DX 194, p. 395, 7/16/37.
[732] GX 438, p. 5759, 1931. GX 439, p. 5766, 7/28/32. GX 546, p. 1038, 4/20/36.
[733] GX 76, pp. 238–39, 2/10/36.
[734] DX 544, p. 1036, 9/13/35. DX 548, pp. 1047, 1050, 6/23/38.
[735] GX 77, pp. 254–56, 2/11/33. DX 544, p. 1036, 9/13/35.

cially in 1938 enabled duPont in 1939 and 1940 to regain substantial cigar business from Sylvania.[736]

314

Prior to 1930 cigarette packages were overwrapped with glassine.[737] With availability of moistureproof cellophane the cigarette companies adopted it as the overwrap for their packages.[738] Cigarettes were a negligible factor in duPont sales in 1930,[739] but accounted for 20% of its total volume in 1931,[740] and contributed to the doubling of moistureproof sales in 1931 as compared with 1930.[741] Up to 1933 the cigarette industry used duPont film exclusively.[742] Commencing about 1934, Sylvania began to sell quantities of moistureproof cellophane to the cigarette industry.[742] By 1938 its customers in that industry included Reynolds, American Tobacco Co., Brown & Williamson, and Stephano Co.[744] Thereafter Sylvania obtained additional business from P Lorillard.[745]

315

DuPont rolls have been of better quality than those produced by Sylvania, and this superiority has contributed to the greater sales of duPont.[746]

1534

316

The quality of duPont cellophane has been generally superior to that produced by Sylvania.[747] This superiority has lessened since the acquisition in 1946 of Sylvania by American Viscose Company.[748] The superiority of duPont quality in large part is due to its research.[749]

317

Superior quality of duPont's cellophane as compared with that of Sylvania has been the determining factor in the purchase by customers of all or almost all of their cellophane from duPont.

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[736] GX 79, pp. 284–85, 2/9/39. GX 80, p. 297, 2/9/40, 1939. GX 81, p. 305, 2/9/41, 1940. DX 548, p. 1050, 6/23/38.
[737] Leinbach, Tr. 6769–70. Nelson, DX 1020, p. 313.
[738] GX 438, p. 5755, 2/9/32.
[739] Ibid.
[740] Ibid.
[741] GX 395, p. 5488, 5/15/50.
[742] GX 442, p. 5784, 1/23/34.
[743] GX 76, p. 239, 2/10/36, GX 444, pp. 5811–12, 2/9/37.
[744] GX 79, pp. 283–84.
[745] GX 414, p. 5617.
[746] Leeds, DX 1011, p. 82. Goland, DX 1015, p. 185. Martin, Tr. 6365–67.
[747] Reichel, Tr. 6097, 6103. McCune, Tr. 5583–84. Mitchell, Tr. 5535. Goland, DX 1015, pp. 184–85. Jakes, DX 1006, pp. 6–7. Horn, DX 1010, pp. 67–68. McCurry, DX 1016, p. 216. Leeds, DX 1011, pp. 81–82. Wilcox, DX 1013, pp. 127–29.
[748] Reichel, Tr. 6097, 6102–03. McCune, Tr. 5584, 5627–28. McCurry, DX 1016, p. 216. Leeds, DX 1011, p. 81.
[749] Mitchell, Tr. 5532. McCune, Tr. 5584. Wilcox, DX 1013, p. 127.

Such customers include Curtiss Candy Company,[750] General Foods,[751] Kraft Foods,[752] and National Biscuit Company,[753] among users, and Shellmar,[754] Milprint,[755] Cellu-Craft,[756] and Marathon,[757] among converters.

318

Quality of cellophane, particularly the uniformity of thickness, is of importance to converters. The high speed printing and bag making they perform requires cellophane with almost no variation in thickness.[758]

1535 319

DuPont's manufacturing efficiency as to cellophane is greater than Sylvania's,[759] due to duPont's research program.[760]

Sylvania casts film at slower speeds, has greater waste, less efficient solvent recovery, requires more employees per casting machine, and produces less poundage per casting machine.[761]

320

DuPont invested more money per casting machine than Sylvania. Due to duPont's productivity and manufacturing efficiency, duPont's investment per pound of sales was smaller than that of Sylvania.[762]

321

A casting machine is the basic unit for manufacture of cellophane.[763] The following table indicates number of casting machines in operation by duPont and Sylvania during the period 1924–47.[764] Neither duPont nor Sylvania has put additional casting machines into operation since 1947.[765] Olin in 1951 put an eight casting machine plant into operation and thereafter put a ninth casting machine into operation.[766]

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[750] Jakes, DX 1006, pp. 6–8.
[751] Horn, DX 1010, pp. 67–68, 78.
[752] Wilcox, DX 1013, pp. 127–29.
[753] McCurry, DX 1016, p. 216.
[754] Martin, Tr. 6363–66, 6452–53.
[755] Hanson, DX 1018, p. 255.
[756] Leeds, DX 1011, pp. 81–82.
[757] Croy, DX 1021, pp. 345–46.
[758] Martin, Tr. 6364, 6378, 6399–6400. Leeds, DX 1011, p. 82. Goland, DX 1015, pp. 184–85.
[759] GX 561. McCune, Tr. 5539–49. Reichel, Tr. 6099–6100.
[760] McCune, Tr. 5577–78.
[761] McCune, Tr. 5539–49. Reichel, Tr. 6099–6100.
[762] DX 612, p. 1248, 3/22/44.
[763] GX 25, p. 131, 7/2/43.
[764] GX 538.
[765] GX 304, p. 5482. GX 410, p. 5597.
[766] Olsen, Tr. 6830, 6/11/51. DX 978, p. 2008.

Year	DuPont	Sylvania
1924	2	
1926	4	
1928	6	
1930	29	3
1932	36	8
1536 1934	40	12
1936	40	17
1938	48	19
1940	48	19
1942	56	21
1944	48	21
1946	48	21
1947	56	21

322

United States cellophane producers competed on the basis of packaging service.[767] DuPont established a packaging development department in 1929 which has assisted customers to create packages employing cellophane.[768] Purpose of the project was to promote the sale of cellophane, particularly that of duPont.[769] Up to 1946, Sylvania had not established any organized packaging development section.[770]

323

DuPont's cooperation in constructive work with packaging machinery manufacturers has been greater than that of Sylvania. Sylvania began cooperation after most of the developments were worked out and has made no substantial technical suggestions to machinery manufacturers.[771] DuPont's efforts to widen the use of packaging machinery for cellophane were much greater than those of Sylvania.[772] DuPont's work in the development and promotion of packaging machinery improved the sales of
1537 Sylvania and other packaging material manufacturers, whose products can be used on the same machines as well as duPont sales.[773]

324

Since January 1, 1947, duPont list prices for its cellophane and Sylvania prices for its cellophane have differed in the following respects:

(a) Different list prices per pound on orders of 500 pounds or more of roll cellophane of comparable types.[774]

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[767] Russell, Tr. 6478–79. DX 338, p. 645, 2/2/25.
[768] GX 431, p. 5678, 4/26/29. DX 91, p. 209, 11/19/47.
[769] R. R. Smith, Tr. 5743–49. DX 338, p. 645, 2/2/25. DX 348, p. 663, 2/1/30. DX 80, p. 294, 2/9/40.
[770] DX 561, p. 1082, 7/2/46. Martin, Tr. 6367–68.
[771] Tindal, DX 1012, pp. 109–11.
[772] Tindal, DX 1012, p. 111. Russell, Tr. 6478.
[773] GX 80, pp. 294–95, 2/9/40.
[774] DX 591, p. 1128, 1951.

(b) Sylvania at all times allowed direct customers 1% cash discount whereas duPont allowed none until August 1949, when it adopted a 1% discount to compete with Sylvania.[775]

(c) Differences in area per pound until November 1947.[776]

(d) DuPont's only price was for orders of 500 pounds or greater until Sylvania had different and higher prices for quantities under 500 pounds.[777]

325

Despite existence of similar list prices for cellophane during the period 1930 to 1946, on numerous occasions there was competition between Sylvania and duPont on the basis of price. Sylvania departed from its list prices by supplying first quality film at second quality prices,[778] by quantity discounts on small volume orders,[779] by combining printed and unprinted cellophane in the determination of the rate of quantity discount,[780] by allowing quantity discounts at a rate based on aggregate pur-
1538 chases of bakers purchasing through a cooperative group,[781] by billing less than case orders at the lower case price,[782] and by granting a converter discount to an important customer that was not manufacturing converted cellophane for resale.[783]

326

From 1941 to 1949 the cash discount allowed by Sylvania was 1% to customers and 2% to agents.[784] During the same period duPont allowed no cash discounts to either customers or agents.[785]

327

Sylvania's actual sales at less than list prices resulted in numerous shifts of customer's business from duPont to Sylvania.[786]

328

Sylvania did not engage in developmental selling to the same extent as duPont.[787] Its sales and technical service to customers

[775] DX 569, p. 1099, 6/3/49. DX 591, p. 1128, 1951. DX 383, p. 713, 9/12/49. DX 570, p. 1100, 8/9/49. DX 596, p. 1169, 4/7/50.
[776] DX 591, p. 1128, 1951.
[777] Ibid.
[778] GX 438, p. 5759, 2/9/32. GX 437, p. 5751, 7/28/31. GX 442, p. 5784, 1/23/34. DX 574, p. 1105, 3/30/33. DX 581, p. 1114, 4/14/33.
[779] GX 438, p. 5760, 2/9/32. GX 439, p. 5766, 7/28/32.
[780] GX 441, p. 5780, 7/26/35.
[781] GX 77, pp. 257–59, 2/11/36. GX 78, pp. 272–73, 2/8/38.
[782] DX 567, p. 1096, 5/1/44. DX 573, p. 1104, 6/19/32.
[783] Horn, DX 1010, p. 67.
[784] DX 563, p. 1091, 1947. Replogle, Tr. 1902. DX 294, p. 759, 11/1/44.
[785] DX 555, p. 1065, 10/19/41. GX 5490, p. 5391, 8/19/42. GX 5478, p. 5370, 10/7/41.
[786] DX 563, p. 1091, Feb. 1947. DX 559, p. 1077, 5/15/44. DX 582, p. 1115, 10/17/40. DX 543, pp. 1003–15, 1018, 1934. DX 576, p. 1107, 9/30/32.
[787] Jakes, DX 1006, p. 8. GX 440, p. 5774, 1/27/33. Reichel, Tr. 6065.

could not compare with that rendered by duPont.[788] It had no organized package development service, did no consumer advertising, and did not undertake market research essential to the initial development of new uses.[789]

329

DuPont cellophane has had uniformity of gauge. This quality makes for uniform tension on the film, diminishes
1539 breakage in packaging and converting machines, and enables printing to be precisely in register.[790]

330

DuPont has furnished customers, both users and converters, with technical assistance. DuPont's service was superior in this respect to Sylvania's.[791]

X. The Basic Moistureproof Patents

(Findings 331–339)

331

Moistureproof cellophane was a duPont invention. No other party made any contribution to its development.[792]

332

DuPont got five basic patents upon its inventions of the product moistureproof cellophane and methods for its manufacture. Basic product patent, U. S. Patent No. 1,737,187, which issued November 26, 1929, claimed as a new product a sheet or film of regenerated cellulose combined with a moistureproofing composition and having a resistance to the transmission of water vapor at least seven times as great as plain cellophane. It claimed specific embodiments of that invention.[793] The remaining four patents, issued October 6, 1931, covered duPont's method of operation and coating compositions discovered by duPont inventors. No. 1,826,696 claimed coating compositions for moistureproof cello-

[788] Jakes, DX 1006, p. 9. McCurry, DX 1016, p. 217. Wilcox, DX 1013, p. 130. Goland, DX 1015, p. 188. Martin, Tr. 6367–68.

[789] 1-X 561, p. 1082, 7/2/46. Reichel, Tr. 6065. Jakes, DX 1006, pp. 8–9. Wilcox, DX 1013, pp. 130–31. McCurry, DX 1016, p. 217.

[790] Martin, Tr. 6363–67. Jakes, DX 1006, pp. 6–8. Horn, DX 1010, pp. 67–68. Leeds, DX 1011, pp. 82–83. Wilcox, DX 1013, pp. 127–28. Goland, DX 1015, pp. 184–86. McCurry, DX 1016, p. 216. Hanson, DX 1018, p. 255.

[791] Jakes, DX 1006, pp. 6, 8–9. Leeds, DX 1011, pp. 83–86. Wilco, DX 1013, pp. 130–31. Goland, DX 1015, pp. 187–89. McCurry, DX 1016, p. 217. Ramsay, DX 1017, p. 245. Elmstrom, DX 1019, p. 285.

[792] Benger, Tr. 5437–38.

[793] W. W. Smith, Tr. 6515 GX 2001A, p. 1981, No. 3 (Schedule of Patents).

phane consisting of four named ingredients in modifications and combinations. No. 1,826,697 was an apparatus patent on machinery used by duPont for applying the coating to regenerated cellulose film. No. 1,826,698 was concerned with the method of coating, particularly the humidifying of the base sheet. No. 1,826,699 was concerned with the method of moistureproofing regenerated cellulose film in a process in which the coating compositions were heated above a stated melting point.[794] Validity of these patents is not challenged, and is conceded by plaintiff for purposes of this suit.[795]

1540

333

DuPont employed the processes covered by its U. S. Patents Nos. 1,826,698 and 1,826,699, which were among the four basic process patents issued in 1931.[796] It was not operating under apparatus patent No. 1,826,697 when it expired in 1948, since that apparatus had since been displaced by better technology.[797]

334

Throughout the life of the basic moistureproof cellophane product patent, No. 1,737,187, no transparent regenerated cellulose film that resisted transmission of water vapor at least 7 times as well as plain cellophane could be made or sold in the United States without infringement of the claims of that patent.[798]

335

Principal growth in the cellophane industry occurred after duPont's invention of moistureproof cellophane,[799] which by 1940 accounted for over 80% of all cellophane sales in the United States.[800]

336

Relative proportions of U. S. production of plain cellophane and moistureproof cellophane reversed from 3.9% moistureproof and 96.1% plain in 1927 to over 85% moistureproof and less than 15% plain by 1943. For the period 1943–47, inclusive, national production was 86.4% of moistureproof types and 13.6% of plain cellophane.[801] For the year 1950, on a dollar basis

1541

[794] W. W. Smith, Tr. 6515–16. GX 2001A, p. 1982, Nos. 9, 10, 11, 12.
[795] Minicus, Tr. 6960–62.
[796] W. W. Smith, Tr. 6582–84.
[797] W. W. Smith, Tr. 6606.
[798] U. S. Pat. No. 1,737,187. W. W. Smith, Tr. 6514, 6539–40. DX 306, p. 588, 1/9/30.
[799] DX 335, p. 641.
[800] DX 367, p. 685, 11/27/40.
[801] GX 532.

over 90% of all domestic sales were moistureproof cellophane, whereas plain cellophane accounted for less than 10% of dollar sales.[802]

337

Principal growth in cellophane sales has been in moistureproof cellophane.[803] This is shown by the following table of dollar sales, duPont and Sylvania, broken down by plain and moistureproof, for the period 1924–1950.[804]

	DuPont			Sylvania		
	Plain	Moisture-proof	Total	Plain	Moisture-proof	Total
1924	$1,306,662		$1,306,662			
1925	1,942,373		1,942,373			
1926	2,982,542		2,982,542	Sylvania began production in 1930		
1927	*2,869,044		2,869,014			
1928	3,131,608	$603,222	3,734,830			
1929	[illegible]8,777	1,990,843	6,219,620			
1930	[illegible]306,440	6,588,489	10,894,929	N. A.	N. A.	N. A.
1931	[illegible]4,918,294	11,149,513	16,067,807	N. A.	N. A.	N. A.
1932	5,052,422	10,325,539	15,377,961	$1,916,449	$1,091,158	$3,007,607
1933	4,981,306	11,686,804	16,668,110	2,114,506	1,759,572	3,874,078
1934	5,359,327	13,459,023	18,818,350	2,120,127	3,095,148	5,215,275
1935	5,126,685	13,581,480	18,708,165	2,131,884	3,906,913	6,038,797
1936	6,012,868	16,674,063	22,686,931	2,371,318	4,987,109	7,358,427
1937	6,204,768	18,850,063	25,054,831	2,241,066	5,438,522	7,679,588
1938	5,907,989	19,667,671	25,575,660	2,547,850	6,284,401	8,832,251
1939	6,561,206	22,778,550	29,339,756	3,283,310	6,650,291	9,933,601
1940	6,721,422	24,327,492	31,048,914	3,365,902	6,866,069	10,231,971
1941	8,960,865	31,013,706	39,974,571	4,029,240	8,799,764	12,829,004
1942	4,535,340	30,115,596	34,650,936	2,163,165	11,204,888	13,368,053
1943	4,297,047	34,937,420	39,234,467	1,664,011	10,677,563	12,341,574
1944	5,006,154	34,350,852	39,357,006	1,432,947	10,671,004	12,103,951
1945	4,453,135	35,361,199	39,814,334	1,785,954	10,524,162	12,310,116
1946	4,984,310	37,665,221	42,649,531	2,037,739	12,202,521	14,240,260
1947	7,741,573	47,598,053	55,339,626	2,093,250	14,388,668	16,481,918
1948	9,483,247	64,255,320	73,738,567	2,885,008	17,399,474	20,284,482
1949	8,234,870	77,701,608	85,936,478	2,711,094	19,074,254	21,785,348
1950	9,330,776	89,850,416	99,181,192	2,674,961	26,809,793	29,484,754

*Includes 58,279 pounds of moistureproof not reported separately in 1927.

1542 338

The important protective quality of cellophane, resistance to transmission of moisture vapor,[805] was confined in the years 1929–1946 to products falling within the claims of duPont's United States product patent No. 1,737,187,[806] validity of which is conceded.[807]

[802] DX 536, p. 992.
[803] GX 540, p. 2116.
[804] DX 536, p. 992.
[805] Leinbach, Tr. 6784.
[806] DX 306; p. 558, 1/9/30. W. W. Smith, Tr. 6514–15.
[807] Minicus, Tr. 6960–62.

339

Moistureproof cellophane in the period subsequent to its commercial introduction in 1927 made the buying public package conscious and its growth stimulated use of light weight papers. Cellophane sales increased from about 28,000,000 pounds in 1931 to approximately 204,000,000 pounds in 1948, while during the same period the total sales of packaging papers, cellophane and other films together, rose from 300,000,000 pounds to approximately 1,500,000,000 pounds.[808]

XI. DuPont Did Not Engage in Predatory Practices as Alleged

A. DUPONT'S DECISIONS AS TO CHANGES IN ITS CAPACITY WERE MADE ON THE BASIS OF BUSINESS CONSIDERATIONS, AND NOT TO SUPPRESS COMPETITION OR TO CREATE ARTIFICIAL SHORTAGES

(Findings 340–353)

340

DuPont expanded cellophane capacity to meet reasonably foreseeable demand.[809] In most cases sales achieved were in excess of the amount forecast at the time of plant expansion.[810]

1543 Capacity was not expanded with the purpose of stifling competition, creating excess capacity to overhang the market, or forestalling potential competitors.[811]

341

DuPont's plant expansions have been based on range estimates of possible sales. Projects for expansion are prepared and submitted to management stating reasons in support. These reasons have not included forestalling competitors.[812]

342

DuPont expanded its capacity for cellophane when it had more business than it could supply and forecasted additional business in the future. Expansion was not undertaken with idea of obtaining any predetermined percentage of domestic cellophane production or of the flexible packaging market.[813]

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[808] GX 583 (Imp. Doc. No. 39), p. 1, 5/16/49.

[809] GX 419, pp. 5633X35, 2/13/29. GX 424, pp. 6546X47, 5/8/39. GX 125, pp. 426–28, 9/1/43. GX 132, p. 435, 4/25/45. GX 109, pp. 403X05, 11/15/45. GX 114, pp. 412–14, 1/11/46. DX 372, p. 695, 6/27/47. Yerkes, Tr. 6948. McCune, Tr. 5585, 5589. See also DX's 602–620.

[810] Compare GX 395, p. 5488, 5/15/50 with exhibits, note 1, supra.

[811] DX 598, p. 1214, 1951. DX 610, p. 1243, 4/19/38. Yerkes, Tr. 6949–50. Carpenter, Tr. 6282–83. McCune, Tr. 5589–90, 5592–96.

[812] McCune, Tr. 5585, 5589–90, 5594–96.

[813] Yerkes, Tr. 6948.

343

Most of the increase in duPont's capacity to produce cellophane has resulted from improved efficiency of manufacturing with existing equipment rather than installation of new plant.[814] Better efficiency resulted in increased output per unit of existing plant.[815]

344

In determining whether to expand duPont followed business methods. It considered estimates of sales in the next few years, and the relation between the estimated cost of expanding
1544 production and the revenue from the projected increased output.[816] The effect of the expansion on the entry of other manufacturers of cellophane was not a principal factor in duPont's decision to expand.[817]

345

Plaintiff conceded duPont's expansion of productive capacity was not illegal.[818]

346

DuPont has never sought to create a shortage of cellophane and has not closed down plant nor taken any other action with the intention of creating a shortage.[819]

For ten years before 1941, duPont production increased at the compound rate of 15%[820] and in March 1941 its eight machine Clinton #1 plant came into production.[821]

Production of both duPont and Sylvania was curtailed during World War II as the result of Government action to preserve manpower and raw materials. Supply available for civilian consumption was further curtailed by use of cellophane for war purposes, and by Governmental limitations on the use of cellophane.[822]

Cellophane plants could not be built during the war. Work on duPont's Clinton #2 plant commenced almost immediately after V-J Day, and it began production in February 1947.[823]

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[814] McCune, Tr. 5548, 5586. DX 386. Compare GX 393, p. 5476 and GX 394, p. 5482.

[815] McCune, Tr. 5539–48, 5578. DX 386.

[816] GX 417, p. 5628, 2/29/28. GX 415, pp. 5623–26, 5/4/28. GX 418, pp. 5629–32, 5/12/28. GX 419, pp. 5633–35, 2/13/29. GX 420, pp. 5636–37, 3/21/29. GX 421, pp. 5638–40, 6/29. GX 455, pp. 5885–89, 4/21/30. GX 125, pp. 426–28, 9/3/43. GX 150, pp. 463–65, 2/2/45. GX 98, pp. 386–87 3/29/45. GX 132, p. 435, 4/25/45. GX 109, pp. 403–04, 11/15/45. GX 114, pp. 412–14, 1/11/46.

[817] GX 424, p. 5647, 5/8/39. GX 425, pp. 5648–54, 5/8/39. GX 96, pp. 383–84, 2/29/45. GX 99, p. 388, 5/10/46. McCune, Tr. 5589–90, 5592–96. Yerkes, Tr. 6943, 6949–50.

[818] Minieus, Tr. 1493.

[819] McCune, Tr. 5596–97. Yerkes, Tr. 6949.

[820] GX 125, p. 426, 9/1/43.

[821] Answer, Para. 17. GX 32, p. 154, 8/23/44.

[822] GX 88, p. 339, 3/10/47. GX 84, pp. 320–21, 3/1/43. GX 393, p. 5476, 5/15/50. GX 410, 5592. GX 32, p. 153, 8/23/44.

[823] DX 615, pp. 1255–56, 11/4/44. DX 617, p. 1258, 9/21/45. Answer, para. 17.

1545

347

In May 1942, the Governmental restrictions on the use of cellophane had caused demand to drop to the extent duPont had twenty casting machines idle.[824] It decided to close down Buffalo #1 plant, consisting of eight casting machines.[825] Thereafter at plaintiff's request and pursuant to a contract with plaintiff, the plant was converted to production of rayon tire yarn.[826] It has never been reconverted to cellophane manufacture.

348

During World War II, war uses took an increasing percentage of duPont's cellophane output. This percentage rose steadily from 1941 to a high of about 75% of all duPont cellophane by 1945.[827]

349

Since World War II, there has been expansion in packaging, particularly in consumer size units, and hence increase in demand for flexible packaging materials.[828] Producers of such materials, including cellophane producers, have increased their capacity, but have been unable to satisfy the demand except for a period during 1949 and a period commencing January 1, 1952.[829] Demand for cellophane has exceeded supply not only in the United States, but also in Europe and South America.[830]

1546

350

Waxed paper, glassine and flexible packaging materials were, like cellophane, in short supply during World War II, and in postwar years. Occurrence of periods of relatively free supply of cellophane in 1949 and 1952 coincided with similar periods of relatively free supply of other flexible packaging materials.[831]

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[824] GX 32, p. 154, 8/23/44.
[825] GX 32, p. 155, 8/23/44. GX 394, p. 5482, 5/15/50.
[826] GX 32, pp. 153–61, 8/23/44. GX 394, p. 5482, 5/15/50. Yerkes, Tr. 6950.
[827] GX 87, p. 336, 1/46. GX 6002, pp. 8130, 8132, 6/8/51.
[828] Leeds, DX 1011, pp. 93–94. Tindal, DX 1012, p. 119. Ellies, DX 1014, p. 134. McCurry, DX 1016, pp. 214, 218–22. Ramsay, DX 1017, pp. 233–34. Elmstrom, DX 1019, p. 290. Nelson, DX 1020, p. 326. Croy, DX 1021, pp. 343–44. GX 6002, Book 45, pp. 8116–21, 6/8/51.
[829] GX 581, p. 7338, 9/50. GX 573 (Imp. Doc. No. 13), 1/26/51. DX 596, p. 1167, 4/7/50. Leeds, DX 1011, p. 190. Ellies, DX 1014, p. 144. Goland, DX 1015, pp. 181, 190. Ramsay, DX 1017, p. 246. Hanson, DX 1018, p. 256. Nelson, DX 1020, p. 326. R. R. Smith, Tr. 6003. Leinbach, Tr. 6775, 6777–78.
[830] GX 88, p. 343, 3/10/47. GX 445, p. 5823, 1/48. DX 592, p. 1130, 1946. DX 371, p. 693, 2/7/47. DX 595, pp. 1151–52, 1/49.
[831] Cellophane: R. R. Smith, Tr. 6003. Hanson, DX 1018, p. 256. Glassine & greaseproof: Leinbach, Tr. 6775, 6777–78. Glassine: Leeds, DX 1011, p. 100. Goland, DX 1015, pp. 181, 190. Wax paper and glassine: Ramsay, DX 1017, p. 246. Nelson, DX 1020, p. 326. Pliofilm: Ellies, DX 1014, p. 144. Cellophane, glassine, wax paper, foil, etc.: GX 581, p. 7338, 9/50. GX 573 (Imp. Doc. No. 13), 1/26/51. DX 596, p. 1167, 4/7/50.

351

In 1952 all flexible packaging materials except polyethylene were in free supply, and waxed paper, glassine and cellophane were considerably undersold.[832] At that time, duPont was operating its cellophane productive facilities at approximately 72% of capacity.[833]

352

During periods when demand for cellophane was greater than ability of producers to supply, duPont has lost business and has been hampered in its competition with other flexible packaging materials.[834] When cellophane has been in free supply as it was during 1949 and is now,[835] duPont has been unable to regain some of the business it lost during the shortage periods.[836]

1547 353

During the postwar period the demand for cellophane was greater than at any previous time, owing to the increase in packaging for self-service supermarkets, then in their greatest period of growth.[837] During this period cellophane prices have more closely approached those of waxed paper and glassine than at any previous time.[838]

B. POTENTIAL COMPETITORS WERE NOT EXCLUDED

(Findings 354–388)

354

No proof was presented any person failed to manufacture cellophane as the result of any act done by duPont.

355

There is no proof there has been any potential competitor who desired to manufacture cellophane and did not do so.

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[832] Leeds, DX 1011, p. 100. Ramsay, DX 1017, p. 246. Nelson, DX 1020, p. 326. Goland, DX 1015, pp. 181, 190–91. Leinbach, Tr. 6777. Martin, Tr. 6459. R. R. Smith, Tr. 5761, 5980, 6003.

[833] R. R. Smith, Tr. 5845.

[834] R. R. Smith, Tr. 5759, 5880–81. Leinbach, Tr. 6783–84.

[835] R. R. Smith, Tr. 5761. Martin, Tr. 6759.

[836] R. R. Smith, Tr. 5761, 5998–99.

[837] GX 6002, pp. 8116–21; 6/28/51. DX 595, pp. 1149–51, 1949. DX 596, p. 1170, 4/7/50. Horn, DX 1010, pp. 66, 76.

[838] DX 994.

356

There is no proof duPont possesses power to exclude potential competitors who may desire to manufacture cellophane.

357

DuPont employed lawful business methods in attempting to keep apprised of competitive developments[839] and did not attempt to stifle competitors.[840]

358

No evidence was offered any potential competitor was excluded from manufacture of cellophane as a result of duPont's size
1548 or prestige in the chemical industry. Sylvania is the largest producer of viscose rayon in the United States with assets of at least $165,000,000.[841] Olin Industries, another cellophane manufacturer, has assets of approximately $180,000,000.[842] Other concerns with substantial assets have been engaged in the manufacture of competing flexible packaging materials, such as Pliofilm, foil and papers.[843]

359

DuPont did not suppress potential competition by Rayonier in the manufacture of cellophane.[844]

360

Rayonier is a wood pulp manufacturer and supplies wood pulp to duPont, among others.[845] The wood pulp it manufactured before 1930 was unsatisfactory for the manufacture of cellophane or rayon.[846] An agreement was entered into between duPont and Rayonier on September 27, 1930 under which Rayonier for a fee received substantial secret information and technical assistance from duPont, which enabled Rayonier to produce a satisfactory dissolving pulp for rayon and cellophane manufacture.[847] The fee was modest in comparison to the essential assistance given under this agreement.[848] Improvements in Rayonier's pulp resulting from the technical assistance by duPont were made avail-

[839] Yerkes, Tr. 6951.
[840] Yerkes, Tr. 6956–57.
[841] DX 538, p. 994, 1951. DX 985 (Moody's Industrials, 1950).
[842] Olsen, Tr. 6909–10. DX 983, supra.
[843] DX 983, supra.
[844] Pickens, Tr. 6128, 6152–53.
[845] DX 622, p. 1266, 1951. Pickens, Tr. 6129–30, 6107.
[846] Pickens, Tr. 6111. GX 4008, p. 3714, 9/27/30.
[847] GX 4448, p. 6211, 1/10/40. DX 633, p. 1289, 11/2/38. Pickens, Tr. 6114–17.
[848] Pickens, Tr. 6132, 6138.

able to many other rayon or cellophane manufacturers, including Sylvania.[849]

361

DuPont has bought wood pulp for cellophane manufacture in substantial quantities from many suppliers other
1549 than Rayonier,[850] and there is wood pulp available for all cellophane manufacturers.[851]

362

Rayonier did not desire to enter into the business of manufacturing cellophane.[852]

363

The 1930 contract between duPont and Rayonier expired in September, 1945.[853] There is no proof either party has any intention to extend it, or there were any understandings extended beyond the expiration of the contract.

364

The 1930 contract between duPont and Rayonier did not exclude Rayonier from the manufacture of cellophane.[854]

365

DuPont did not suppress competition by Visking Corporation in the manufacture of cellophane. DuPont has never had a contract, arrangement or understanding with Visking which would have prevented Visking from manufacturing and selling cellophane,[855] provided duPont patents were not infringed.

366

Visking never desired to enter cellophane business. It was interested in the manufacture of cellulose sausage casings.[856]

367

DuPont acquired certain Cohoe patents in 1923 which

[849] DX 633, p. 1289, 11/2/38. Pickens, Tr. 6130, 6149.
[850] DX 622, p. 1266, 1951. Haley, Tr. 4789. Pickens, Tr. 6107.
[851] Olsen, Tr. 6831. GX 594, p. 7553, 9/28/48.
[852] Pickens, Tr. 6153.
[853] GX 4008.
[854] Pickens, Tr. 6153.
[855] Yerkes, Tr. 6954. DX 644, p. 1305, 1/26/31.
[856] Yerkes, Tr. 6953-54. GX 594, p. 7548, 12/14/49.

1550 covered the use of glycerine as a softening agent in the manufacture of cellulose sausage casings, and were of interest to duPont because of their possible relevance to the use of glycerine in the manufacture of cellophane.[857]

368

In connection with experimental work on cellulose sausage casings one Freund discovered he could not manufacture these casings without infringing the Cohoe patents acquired by duPont. He asked duPont for a license under these patents. DuPont agreed in 1925 to license the patents and its technical information pertinent to cellulose casing manufacture to a company to be formed by Freund. As payment it received 40% of the common stock in the company, Visking Corporation.[858]

369

Under the agreements of October 20 and December 31, 1925 between duPont and Visking, duPont licensed to Visking patents and technical information for the manufacture of cellulose sausage casings and in return became entitled to Visking's technical information and patents as to cellophane sheeting.[859] No limitations prevented Visking from making cellophane if it used its own patents and information, but it was barred from using duPont patents and information for that purpose.[860] There were no understandings between the parties outside the contract.[861]

370.

By rendering financial, managerial and technical assistance to Visking, duPont helped to organize that Company and to
1551 develop it into a growing and profitable business.[862] Visking regarded duPont's technical and managerial assistance as very valuable.[863]

371

The agreements of October 20 and December 31, 1925 between Visking and duPont were cancelled as of January 25, 1945. There is no proof this cancellation was anything other than bona fide or

[857] GX 4442, p. 6199, 10/29/23. DX 643, p. 1302, 9/23/24. Yerkes, Tr. 6952.
[858] DX 645A, p. 1327, 5/25/42. Yerkes, Tr. 6952. GX 4089, p. 3827.
[859] GX 4089, pp. 3827–34, 10/20/25. GX 4090, pp. 3835–37, 12/31/25. GX 4091, pp. 3838–40, 12/31/25. DX 645A, pp. 1323–38, 5/25/42.
[860] DX 644, p. 1305, 1/26/31.
[861] Yerkes, Tr. 6954.
[862] DX 645, pp. 1327, 1328, 5/25/42. DX 656, p. 1353, 6/12/47.
[863] DX 645, pp. 1327, 1328, 5/25/42.

there were any understandings which extended beyond termination of the contracts.[864]

372

DuPont sold all its stock in Visking prior to the filing of the complaint in this action.[865]

373

Representatives of Visking Corporation in June 1948 conferred with duPont with respect to its offer to license its cellophane patents and technology, and arrangements were made for the Visking people to visit a duPont plant to obtain a visual concept of cellophane manufacture.[866] Visking made no proposal to accept duPont's offer.[867]

374

DuPont never entered into any agreement that had the intent of suppressing potential competition from American Viscose, which is now duPont's principal cellophane competitor in the United States.[868]

375

DuPont entered into a contract with British Cellophane, Ltd., in 1935 regarding the exchange of secret technical informa-
1552 tion.[869] In this agreement it took normal precautions against disclosure of such information to parties not authorized to receive it under the agreement, including shareholders of BCL.[870] One effect of this provision against disclosure of secret data to unauthorized parties was such information could not be passed on to American Viscose by British Cellophane, Ltd., through their common shareholder, Courtaulds, Ltd.[871]

376

The 1935 agreement regarding the exchange of secret technical information between duPont and British Cellophane, Ltd., did not exclude American Viscose from entering the cellophane business in the United States.[872]

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[864] GX 4129, p. 3898, 1/25/45. DX 657, p. 1354, 4/30/46.
[865] DX 656, p. 1353, 6/12/47.
[866] DX 596, pp. 7564–65, 6/4/48.
[867] GX 594, p. 7546, 12/14/49.
[868] Reichel, Tr. 6046–47. Yerkes, Tr. 6956.
[869] GX 1109, pp. 1230–35, 5/17/35.
[870] GX 1109, p. 1232, 5/17/35. GX 4454, p. 6225, 5/25/34.
[871] GX 1109, p. 1232, 5/17/35.
[872] GX 1109, pp. 1230–35, 5/17/35.

377

DuPont and Union Carbide & Carbon Co. never had an agreement they would not compete with each other as to cellophane, glycol cellulose film, or any other kind of flexible packaging material. Likewise, Carbide was not influenced by duPont not to compete with duPont in the manufacture and sale of cellophane. On the contrary, anyone in the Carbide organization suggesting such an understanding would have been discharged.[873]

378

Union Carbide & Carbon Company today manufactures flexible packaging materials which compete with cellophane, including vinylite sheeting and polyethylene.[874]

379

Union Carbide & Carbon Co, never considered engaging in the manufacture and sale of cellophane.[875]

A process for manufacturing glycol cellulose film was acquired by Union Carbide & Carbon Co. from another company which had developed it. Carbide engaged in research and experimental work using glycol cellulose film as a packaging material, but never manufactured it on a commercial scale.[876]

381

Because of its desire to sell raw materials important to the manufacture of glycol cellulose film, Union Carbide & Carbon Company sought to interest duPont, Sylvania, Goodyear Tire & Rubber Co., Marathon Corp., Olin Industries and Industrial Rayon Co. in the manufacture of glycol cellulose film.[877] Both duPont and Sylvania conducted experiments in cooperation with Carbide with respect to manufacture of glycol cellulose film.[878] DuPont concluded it was not interested in manufacture of that product and so informed Carbide.[879] Other concerns approached by Carbide took the same position, and none ever made the film.[880]

382

When unable to interest other companies in manufacturing glycol cellulose film, Carbide decided not to make that film for

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[873] Davidson, Tr. 5866–68.
[874] Davidson, Tr. 5868–69.
[875] Davidson, Tr. 5872.
[876] Davidson, Tr. 5850–53, 5876.
[877] DX 639, p. 1298. Davidson, Tr. 5859–60.
[878] Davidson, Tr. 5856–58.
[879] DX 638, 1297, 1/6/34. DX 641, p. 1300, 11/22/34.
[880] Davidson, Tr. 5859–60.

reasons, including the high manufacturing cost, and the Dreyfus patent, which was controlled by one of the Celanese companies and did not expire until 1941. Controlling factor was Carbide then was the only manufacturer of ethylene oxide in the world and the market for it was expanding. It decided to continue to concentrate on the profitable manufacture of this chemical rather than to invest millions in a field involving mechanical operations with which Carbide was not familiar. The only raw ma-
1554 terial manufactured by Carbide used in making glycol cellulose was ethylene oxide, which comprised only about 6% to 8% of the raw material required for glycol cellulose film manufacture. Carbide is not interested in operating manufacturing processes unless it makes 75% to 90% of the raw materials required for manufacture of the final product.[881]

383

DuPont made no attempt to prevent Union Carbide & Carbon Company from manufacturing either cellophane or glycol cellulose film,[882] and no action of duPont had the effect of excluding Union Carbide & Carbon Company from such manufacture.[883]

384

DuPont had no patents that would have prevented Union Carbide & Carbon Company from manufacturing glycol cellulose film.[884] DuPont had opportunity to buy certain Lilienfeld patents relating to glycol cellulose, but declined to do so despite a belief Carbide was interested in the patents for their relation to glycol cellulose film.[885]

385

Goodyear Tire & Rubber Company did not consider the manufacture of cellophane before late 1948. At duPont's invitation, it investigated the advisability of entering cellophane manufacture, obtained information from duPont and decided not to engage in cellophane manufacture, but to use its funds available for expansion in fields with which it was familiar.[886]

386

There is no proof any of the following companies ever attempted or desired to engage in the manufacture in the

[881] Davidson, Tr. 5860–63.
[882] Davidson, Tr. 5866–67; 5878. DXs 635–41, pp. 1292–1300.
[883] Davidson, Tr. 5867–68.
[884] Davidson, Tr. 5862.
[885] DX 636, p. 1294, 7/7/33. DX 637, pp. 1295–96, 7/10/33.
[886] Ellies, DX 1014, pp. 146–47. GX 594, p. 7516, 12/14/49.

1555 United States of plain cellophane or of moistureproof cellophane.
Rayonier, Inc.
Skenandoa Rayon Co.
Industrial Rayon Co.
Union Carbide & Carbon Corp.
Marathon Corp.
Goodyear Tire & Rubber Co.
Eastman Kodak Company
Monsanto Chemical Company
Transparent Package Company

387

DuPont is a corporation engaged in the chemical industry,[887] and manufactures a variety of products. There is no proof the size of duPont or its manufacture of numerous products has had any influence whatever in the decision of third parties not to engage in cellophane manufacture.

388

There is no proof of the extent of duPont's diversification of chemical products, no proof such diversification as exists has had any effect upon the volume of duPont's sales of cellophane or upon the entry of any concern into the manufacture of cellophane, and no proof such diversification as exists has developed domestic or international affiliations that were not obtainable by other corporations.[888]

C. DISTRIBUTION OUTLETS WERE NOT CONTROLLED

(Findings 389–455)

389

There is no proof as to the number of companies in the United States that engage in the conversion of cellophane.

1556 390

There is no proof of the number of marketing outlets to which cellophane is sold.

[887] Answer, Par. 31.
[888] Complaint and Answer, Par. 31.

391

Sylvania [889] and later Olin [890] had no difficulty in obtaining adequate numbers of converters. Some of Sylvania's converters sold only Sylvania cellophane and others sold both duPont and Sylvania.[891] Sylvania preferred to sell to direct users rather than to converters because of the functional discounts always given converters.[892] Sylvania refused to sell to numerous converters who sought to purchase cellophane from it.[893]

392

Sylvania's dollar sales to converters increased about five-fold from 1935 to 1948. In 1935 there were only ten or twelve recognized cellophane converters. By the end of 1939, Sylvania was selling to 26 converters and by 1948 it was selling to 93 converters. Converters were the second largest sales outlet of Sylvania in the 1935–39 period, constituting less than 20% of Sylvania's sales. This figure rose to 28.8% in 1941 and 32.5% in 1948. Dollar sales to converters increased from $1,150,000 in 1935 to $2,200,000 in 1939, $3,800,000 in 1941, and $6,800,000 in 1948.[894]

393

DuPont has never engaged in the conversion of cellophane.[895] It promoted conversion by independent companies by furnishing encouragement, sales assistance and technical assistance.[896]

1557

394

DuPont prior to World War II had a program of selecting converters to which it would sell. Policy was adopted to enable cellophane, which was a high priced patented product, to fight paper for the business of flexible packaging purchasers.[897]

395

Sylvania, as well as duPont, had a selective converter policy.[898]

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[889] Reichel, Tr. 6048. DX 550, p. 1055, 10/15/40. DX 551, p. 1060, 4/29/42. GX 414, pp. 5618–20.
[890] Olsen, Tr. 6830–31.
[891] Reichel, Tr. 6048. GX 5038, pp. 4517–20, 1942.
[892] Reichel, Tr. 6049.
[893] See, e. g., Goland, DX 1015, pp. 185–86. Leeds, DX 1011, p. 80.
[894] GX 564, p. 8079, 8/31/49. GX 414, pp. 5615, 5618–22.
[895] DX 483, p. 918, 10/15/40.
[896] Martin, Tr. 6328, 6360–63. Leeds, DX 1011, pp. 80–85.
[897] GX 5047, p. 4559, 4/28/41.
[898] GX 5047, p. 4561, 4/28/41.

396

DuPont's selective program in selling converters was to get the special type of selling that was needed to foster cellophane sales.[899] The number of converters was increased as requirements changed.[900] Each application to purchase duPont cellophane for conversion was considered on its merits[901] and duPont's converter distribution was expanded with the growth of the markets to which cellophane could be sold.[902]

397

When duPont commenced the manufacture of cellophane in the United States no one in the United States was engaged in the conversion of cellophane.[903] The first domestic bag manufacture began as a hand operation in a single size in 1925,[904] and printing of cellophane began in 1927.[905]

1558

398

Conversion of cellophane is a highly specialized operation. The successful converters of cellophane are those who over a long period of growth developed improvements, efficiency and technical competence. There are ample converting facilities to meet requirements for converted cellophane.[906]

399

Companies which have grown to be important converters of cellophane, such as Shellmar Products Corp., Dobeckmun Company and Milprint, Inc., were small organizations when duPont persuaded them to undertake conversion of cellophane. Shellmar and Dobeckmun were not even in business when duPont began seeking converters, and Milprint was a small glassine converter.[907] There were many large and strong companies engaged in the conversion of waxed paper and glassine.[908] Most successful converters of cellophane achieved their position by hard work and creative selling, growing from quite insignificant companies to important factors in all types of flexible packaging.[909]

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[899] GX 5047, p. 4559, 4/28/41.
[900] GX 5047, supra, p. 4570.
[901] GX 5047, supra, pp. 4566, 4571.
[902] GX 5047, supra, p. 4560.
[903] GX 5046, p. 4555, 11/5/40. DX 444, p. 871, 11/20/24. Hanson, DX 1018, p. 251.
[904] DX 446, p. 874, 7/23/25.
[905] DX 449, p. 878, 6/20/27.
[906] GX 5357, p. 5161, 3/46. GX 5368, p. 5174, 6/20/46. Hanson, DX 1018, pp. 248, 251. Martin, Tr. 6371–72.
[907] Martin, Tr. 6328–34. Hanson, DX 1018, pp. 247–48, 251.
[908] Nelson, DX 1020, p. 301. Croy, DX 1021, p. 333. Martin, Tr. 6397.
[909] Martin, Tr. 6325–34, 6397–98. Hanson, DX 1018, pp. 247–255.

400

The number of converters purchasing from duPont has increased. From 1940 through 1944 the number of converters purchasing from duPont increased from 35 to 80.[910] Similarly, the number of concerns engaging in the conversion of duPont cellophane has increased since 1945.[911]

1559 401

Due to shortage of cellophane duPont did not sell to new customers for conversion immediately following World War II. It had a broad policy of aiding veterans and set up allotments of cellophane for them if they desired to enter converting. Since duPont believed the excess of demand for converted cellophane over supply was due to shortage of cellophane production rather than any inadequacy of installed converting equipment, it also advised veterans of these facts and some other business would probably give better chance of success.[912]

402

Converters of cellophane seek business on the basis of quality, price and service.[913] Between cellophane converters there has been no uniformity of price as to cellophane wraps or as to other wraps. Ordinarily a customer can buy any particular bag or wrap from more than one converter, and often purchases both cellophane and other wrapping materials from the same converter.[914]

403

DuPont has not attempted to control the territory in which a converter sells products made of duPont cellophane,[915] the prices at which the converter sells such products,[916] or the converted products it will make.[917]

404

During the period December 1938—January 1, 1947 duPont classified converters purchasing from it as "pro-

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[910] GX 5046, p. 4355, 11/5/40. GX 5531, p. 6328, 12/31/44.
[911] DX 437, pp. 853–54, 1948. Goland, DX 1015, p. 190. Martin, Tr. 6371.
[912] GX 5357, pp. 5161–62, 3/8/46. GX 5370, p. 5177, 6/28/46. GX 5368, pp. 5174–75, 6/20/46.
[913] Goland, DX 1015, p. 189. Leeds, DX 1011, p. 87. Elmstrom, DX 1019, pp. 283–84.
[914] Elmstrom, DX 1019, pp. 283–84.
[915] Hanson, DX 1018, p. 260. Ramsay, DX 1017, p. 244. Leeds, DX 1011, p. 88. Goland, DX 1015, p. 189.
[916] Hanson, DX 1018, p. 260, 265. Ramsay, DX 1017, p. 244. Leeds, DX 1011, p. 88.
[917] Hanson, DX 1018, p. 265. Ramsay, DX 1017, p. 244.

1560 motional" and "regular".[918] DuPont's prices were identical to both classes and both sales and technical service were rendered by duPont to both classes.[919] Promotional converter contract in effect during this period provided for exclusive purchases from duPont of the converter's requirements of cellophane, while the contract with a regular converter contained no such provision.[920]

405

DuPont's exclusive contracts with certain so-called "promotional converters" which were in effect during the period 1938–1947 were subject to termination on 30 days' notice by either party.[921]

406

Despite existence of requirements contracts between "promotional converters" and duPont, during the period 1938–1947, converters considered themselves free to purchase cellophane from Sylvania. Milprint purchased from Sylvania in 1944 and at other times.[922] Shellmar purchased from Sylvania at various times prior to 1945, and in 1945 commenced purchasing a considerable percentage of its requirements from Sylvania.[923]

407

DuPont's salesmen called upon end users of converted cellophane. DuPont's purpose in developing converters was to promote usage of cellophane. DuPont encouraged converters to specialized promotion of cellophane and sought to develop business for converters. The intent of these efforts was not to control outlets for cellophane, but to get better distribution of the product.[924]

1561 408

DuPont's policy was a user of cellophane would receive support regardless of whether it purchased direct from duPont or purchased converted film from converters.[925] DuPont salesmen carried samples of converted cellophane and used them in their sales efforts.[926] When a customer preferred printed cellophane or bags

[918] GX 5041, p. 4530, 5/26/42. DX 437, p. 853, 1948.
[919] DX 455–490, pp. 887–925. GX 5041, p 4530, 5/26/42.
[920] GX 5047, p. 4569, 4/28/41.
[921] GX 5204, Para. 8, p. 4903, 12/1/38. GX 5378, Para. 6, p. 5188, 5/13/42. GX 5379, p. 5193, 2/19/46. GX 5380, p. 5194, 3/4/46.
[922] Hanson, DX 1018, pp. 255, 259–60.
[923] Martin, Tr. 6364, 6397.
[924] DX 440, p. 858, 5/8/36. DX 441, p. 860, 4/30/41. DX 442, p. 865, 2/22/43. GX 5047, p. 4564, 4/28/41.
[925] DX 438, p. 855, 11/16/28. DX 485, p. 920, 6/23/41.
[926] DX 439, pp. 956–57, 1/8/31.

he was referred to converters who could fulfill his desires.[927] DuPont preferred the cellophane used to manufacture the converted items to fill such referred orders be duPont cellophane.[928]

409

Milprint, earliest and now one of the important converters of cellophane, has been treated no better than duPont's other customers. It was treated fairly in its allocation during shortage periods but was not favored, and has not been favored in price, or in quality or volume of service rendered.[929]

410

DuPont has not protected its original converters or more important converter customers from competition by other converters. New converters of duPont cellophane have constantly come into being.[930]

411

DuPont promoted use of package machinery and bag making machines by cellophane customers. DuPont did not centralize all business for bags or other processed cellophane in the hands of converters.[931]

1562

412

Converters such as Shellmar and Milprint broadened the sales of cellophane by promotional selling. Such selling involves persuading a customer to adopt a new type of package that will increase sales and give his product the protection it requires.[932]

413

DuPont continued to encourage small organizations that began converting operations. Technical and sales assistance furnished by duPont to these converters was essential to their growth. DuPont's assistance to them included reference of customers, joint calls of duPont salesmen with converter salesmen, market surveys, training salesmen and solution of technical problems.[933]

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[927] DX 438, p. 855, 11/16/28. DX 439, pp. 956–57, 1/8/31. DX 440, pp. 858–59, 5/8/36.
[928] DX 438, p. 855, 11/16/28.
[929] Hanson, DX 1018, pp. 260, 267.
[930] Martin, Tr. 6371–74. DX 437, pp. 853–54, 1948. Goland, DX 1015, p. 190.
[931] DXs 410–435, pp. 810–45.
[932] Martin, Tr. 6340–41. Hanson, DX 1018, p. 253.
[933] Leeds, DX 1011, pp. 83–85. Goland, DX 1015, pp. 187–89.

414

DuPont furnished assistance to regular converters, as well as to promotional converters. Examples of such service to regular converters are advice as to packaging machinery,[934] chemical tests on materials,[935] results of market research,[936] sales literature,[937] manuals as to packaging, and consumer advertising.[938]

415

The one year contracts in effect between duPont and fabricators who purchased some cellophane from it were not requirements contracts.[939] There is no proof any fabricator who was a party to such a contract in fact bought cellophane only from duPont.[940]

1563

416

As of January 1, 1947 duPont terminated all purchase contracts with converters and fabricators, and the only contractual relations since that time have consisted of routine individual orders.[941]

417

Plaintiff conceded duPont did not fix or control prices charged by converters,[942] and duPont did not attempt to fix such prices.[943]

418

Competition for the business of cellophane users has been active between converters of duPont film and converters of Sylvania film.[944] Shifts of business were frequent.[945] Daniels Manufacturing Co., an important Sylvania converter, dominated sale of converted cellophane to the meat industry for years,[946] although converters of duPont cellophane were also selling that industry.[947] Recently, converters of duPont cellophane have been able to capture from Daniels amounts of the meat industry business for converted cellophane.[948]

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[934] DX 466, p. 901, 12/26/45.
[935] DX 468, p. 903, 10/20/47.
[936] DX 470, p. 905, 1/24/40. DX 472, p. 907, 4/26/40. DX 477, p. 912, 5/26/41.
[937] DX 474, p. 909, 4/18/41.
[938] DX 471, p. 906, 1/24/40. DX 478, p. 908, 10/4/40. DX 479, p. 914, 6/20/44.
[939] GX 5404, p. 5249, 1/31/40. GX 5417, p. 5273, 10/3/41.
[940] Compare GX 5417, supra, and GX 414, p. 5619. (Dobeckmun purchases in 1942.)
[941] GX 5034, p. 4506, 12/4/46. DX 437, p. 853, 1948.
[942] Mi[illegible]s, Tr. 1970.
[943] DX 443, p. 869, 6/7/40. Hanson, DX 1018, p. 260. Leeds, DX 1011, p. 88. Ramsay, DX 1017, p. 244. Martin, Tr. 6374.
[944] DX 545, p. 1037, 2/25/36.
[945] GX 80, pp. 295–96, 2/9/40. GX 81, p. 307, 1941. Leeds, DX 1011, p. 80.
[946] GX 82, p. 312, 1942.
[947] GX 443, p. 5798, 1/29/35.
[948] Leeds, DX 101, p. 87.

419

Prior to January 1, 1947, duPont had cumulative annual quantity discounts for different classes of customers.[949] There is no proof these discounts tended to lessen competition at either buyer's level or seller's level.

1564

420

Plaintiff conceded it could offer no evidence any duPont quantity discounts caused any restriction on Sylvania's production or sales.[950]

421

There is no proof duPont's quantity discount was ever the factor in an order by a purchaser or the decision to purchase from duPont was not determined by duPont's quality of cellophane.

422

Sylvania had no understanding with duPont as to quantity discount schedules.[951]

423

Prior to 1936, duPont had quantity discounts to converters.[952] When the Robinson-Patman Act was passed these discounts were reviewed by duPont's Legal Department.[953] Quantity discounts to converters were continued until 1938, when they were terminated on the advice of the Legal Department.[954] In that year, duPont classified processors of cellophane for resale as converters and fabricators.[955] A 3% functional discount was established for fabricators[956] and continued until January 1, 1947, when discount to fabricators was terminated.[957] Converters were classified in 1938 as "promotional" or "regular", with the same functional discounts applicable to purchases by both.[958] In 1938 func-
1565 tional discount to converters was established at 7½% off list, plus an allowance of one-half the cost of approved advertising up to 2½% of purchases.[959] In November 1941, functional discount to all converters was changed to 10% off list, and the advertising allowance eliminated. It continued until Jan-

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[949] Answer, Para. 36. GX 5034, p. 4503, 11/6/45.
[950] Renninger, Tr. 3557.
[951] Reichel, Tr. 6098.
[952] GX 5520, p. 6298, 10/27/36.
[953] GX 470, p. 5946, 9/17/36. GX 5520, p. 6298, 10/27/36.
[954] GX 355, p. 885, 8/30/38. GX 5516, p. 6289, 3/3/38. GX 5540, p. 6341, 11/1/38.
[955] GX 5540, p. 6341, 11/1/38.
[956] GX 5540, p. 6341, 11/1/38.
[957] GX 5034, p. 4509, 12/43/46.
[958] GX 5541, p. 6345, 12/20/38.
[959] GX 5540, p. 6341, 11/1/38.

uary 1, 1947 when it was lowered to 7½%.[960] DuPont's converter discount was lowered to 5% on August 1, 1948, and raised to 7% on October 1, 1950, where it remained.[961]

424

Plaintiff does not contend quantity discounts paid by duPont to converters, which were terminated in 1938, violated the Robinson-Patman Act.[962]

425

DuPont classifies as a converter one who processes cellophane for resale. Converting activities include printing, bag making, laminating, etc. DuPont classifies as a fabricator one who processes cellophane for resale to produce a product not used as primary packaging material, such as drinking straws, ornaments, pressure sensitive cellulose tape, ribbons, bonbon cups, etc.[963]

426

DuPont's classification of processors of cellophane for resale as converters and fabricators was made with advice of counsel, and different functional discounts to the two classes were approved on the basis of absence of competition between the two classes.[964]

427

There is no proof duPont's classification of its customers as direct and indirect, or its sub-classification of in-
1566 direct customers as converters, fabricators, industrial users, jobbers and agents was made with any intent to obtain control over its customers.

428

There is no proof any converter, fabricator, industrial user or distributor of cellophane ever purchased cellophane from duPont rather than from Sylvania as the result of any functional discount allowed by duPont to any class of purchaser.

429

Purchasers from duPont who bought cellophane for converter purposes and for fabricator purposes were allowed the discount

[960] GX 5034, p. 4510. DX 591, p. 1128, 1951.
[961] DX 591, p. 1128, 1951.
[962] Renninger, Tr. 3558.
[963] GX 5034, p. 4510. R. R. Smith, Tr. 5884–85, 5889.
[964] GX 5010, p. 4442, 2/26/42. GX 5011, p. 4443, 2/24/42. GX 5388, p. 5206, 1/10/44. GX 5540, p. 6341, 11/1/38.

granted other converters only on that portion of film purchased for conversion, and the discount allowed other fabricators on the portion purchased for fabrication.[965]

430

There is no proof products manufactured by converters compete with products manufactured by fabricators, which are not used as primary parts of a package and as to which during the period 1938–1946 duPont allowed a functional discount at a different rate, and thereafter no such discount.

431

Prior to January 1, 1947, duPont classified one group of customers as industrial users. There is no proof customers purchasing cellophane from duPont as industrial users competed with customers purchasing from duPont as converters or fabricators.

432

As early as 1928, duPont paid annual cumulative quantity discounts to customers purchasing cellophane for their
1567 own use,[966] it being then the U. S. manufacturer of cellophane.[967] Rates of these discounts and quantity of purchases necessary to earn specific rates were reviewed and revised from time to time.[968] A discount schedule ranging from 2½% on annual purchases over $10,000 to 10% on annual purchases of over $1,500,000 was adopted in November, 1935,[969] and remained until all quantity discounts on cellophane were terminated on January 1, 1947.[970]

433

When the Robinson-Patman Act was passed in 1936, duPont reviewed its quantity discounts to direct users of cellophane,[971] which had been in effect since at least 1928.[972] Under duPont's quantity discounts the maximum price difference to purchasers had been approximately 3¢ a pound. One pound of moistureproof cellophane contains about 21,000 square inches, and will wrap a large number of articles such as cigarette packages. On this basis

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[965] GX 5041, p. 4530, 5/26/42. GX 5415, p. 5271, 10/7/41.
[966] GX 483, p. 6407, 1/21/29.
[967] Answer, Pars. 16, 18.
[968] GX 347, p. 869, 12/31/29. GX 484, p. 6430, 1/21/30.
[969] GX 5522, p. 6313, 10/28/35. GX 5551–5560, 1936.46. GX 5033, p. 4500, 2/28/46.
[970] GX 5034, p. 4508, 12/10/46.
[971] GX 470, p. 5946, 9/17/36. GX 5520, p. 6298, 10/27/36.
[972] GX 483, p. 6406, 6707, 1/21/29.

duPont Legal Department in 1936 advised discounts on cellophane did not have any effect on competition that was forbidden by the Robinson-Patman Act.[973] According to the Legal Department, quantity discounts to direct users were lawful, since they did not injure buyer or create a monopoly, so discounts were continued.[974] This advice was repeated in 1938 with respect to quantity discounts to direct users for discount was an infinitesimal part of customer's cost and could have no effect on competition.[975] In 1943 during the period of maximum price control by plaintiff, duPont's Legal Department advised that the Federal Trade Commis-
1568 sion had indicated disapproval of cumulative quantity discounts such as allowed by duPont to direct users. The Legal Department did not urge immediate abolition of all quantity discounts and advised this would not be necessary unless later Federal Trade Commission rulings were more decisive. DuPont, however, undertook studies of its quantity discount arrangements with direct users,[976] and on its next price change eliminated the quantity discount, effective January 1, 1947.[977]

434

Sylvania gave quantity discounts equal to those granted by duPont.[978] On occasion Sylvania allowed such discounts on annual sales of less than $10,000 to a customer,[979] which was the minimum quantity on which duPont allowed discount,[980] and in cases allowed direct users to include their purchases from converters in computing the rate at which Sylvania would allow a quantity discount.[981]

435

Sylvania allowed quantity discounts to cooperative organizations acting as purchasing agents for numerous bakers, determining rate on basis of the total orders routed to Sylvania through the organization. DuPont did not allow a discount to such agents, but only to the individual baker ordering from duPont.[982]

436

When a direct user was purchasing quantities of cellophane from duPont to entitle it to a discount, Sylvania sold the same customer

[973] GX 5520, p. 6298, 10/27/36.
[974] GX 5521, p. 6310, 11/2/36.
[975] GX 5516, p. 6289, 3/3/38. GX 355, pp. 885, 886, 8/30/38.
[976] GX 5023, p. 4462, 1944. GX 5395, p. 5215, 8/6/45.
[977] GX 5034, pp. 4503, 4506, 12/4/46. GX 500, pp. 6864, 6890, 1/4/47.
[978] Reichel, Tr. 6083–98. Horn, DX 1010, p. 78.
[979] DX 576, p. 1107, 9/30/38.
[980] GX 5522, pp. 6312, 6313, 10/28/35.
[981] DX 589, p. 1126, 4/3/33. DX 543, pp. 1013–14, 1934.
[982] DX 543, pp. 1003, 1012–13, 1018, 1934.

on its own regular quantity discount schedule. There is no proof of the number of occasions on which Sylvania decided to pay more discount than the customer's purchases directly from it would have earned, and no proof of the annual or total amount expended by Sylvania in such extra discounts.[983]

1569

437

Availability of a quantity discount from duPont until 1938 and a functional discount thereafter did not influence Shellmar, one of the most important cellophane converters, to purchase from duPont rather than Sylvania. Sylvania offered as large a discount as duPont, and Shellmar would have preferred two sources of supply. However, it could not use Sylvania cellophane because the quality was not adequate. Quality rather than discount was the reason its purchases were from duPont.[984]

438

DuPont's quantity discounts, which were eliminated January 1, 1947,[985] were paid to small customers as well as large ones. Of 306 quantity discounts paid in 1941, 253 went to customers who purchased less than $50,000 of cellophane in that year.[986]

439

There is no proof of extent, if any, to which duPont's former agents for the sale of unconverted cellophane (H. D. Catty Co., Brooks Paper Co., Zellerbach Paper Co.) competed with jobbers who also handled such cellophane. Principal business of these agents consisted of resale of unconverted cellophane in quantities of 500 lbs. and over.[987] Principal sales by jobbers were of quantities less than 500 lbs.[988] In any event, Catty withdrew from the sale of unconverted cellophane in 1945, Brooks in 1947 and Zellerbach in 1948.[989]

1570

440

Prior to 1948, duPont did not have jobbers in the West Coast area served by its agent Zellerbach.[990] However, duPont had a rep-

[983] Reichel, Tr. 6083–88, 6098.
[984] Martin, Tr. 6368–69; 6399–6400; 6414.
[985] GX 5034, p. 4595, 11/29/46. GX 500, p. 6890, 1/14/47.
[986] GX 5023, p. 4462, 6/21/44.
[987] DX 406, p. 787, 2/2/48. GX 5544, pp. 6356–57, 6/26/43.
[988] GX 5539, p. 6340, 12/9/42. GX 5174, p. 4838, 4/14/43. DX 496, pp. 933–34, 12/28/43.
[989] R. R. Smith, Tr. 5890–93. DX 407, pp. 787–88, 2/2/48.
[990] GX 5503, p. 5411, 2/2/44.

resentative in that area[991] and converters sold into that area.[992] After discontinuance of Zellerbach's agency in 1948,[993] duPont commenced selling direct to jobbers on the West Coast.[994]

441

DuPont did not control resale prices of any of its three agents, or the contractual relations between them and their customers.[995] It did advise an agent as to the desirability of certain clauses in customer contracts.[996]

442

During the period December 1938–November 1941, part of duPont's functional discount to converters consisted of allowing 50% of the converter's approved advertising expense on cellophane, provided the allowance did not exceed 2½% of total purchases. DuPont's advertising allowance was available to regular converters as well as to promotional converters, and allowance was paid to a regular converter.[997]

443

DuPont's advertising allowance to converters did not tend to channel business to duPont, but was a source of friction with important customers.[998]

1571 444

Sylvania made deals with direct customers who were not converters under which it paid part of their advertising costs. This caused purchases from Sylvania by important accounts.[999] DuPont did not grant any advertising allowance except to converters, and to them only in the period 1938–1941.[1000]

445

DuPont did not attempt to fix prices charged by jobbers of duPont cellophane.[1001]

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[991] GX 5120, p. 4700, 8/30/43.
[992] GX 5509, p. 5420, 3/2/44. GX 5504, p. 5413, 6/15/44.
[993] DX 407, pp. 791–92, 4/1/49.
[994] DX 501, p. 939, 6/30/49.
[995] DX 493A, p. 929, 1/5/45. DX 495, p. 931, 4/2/42.
[996] DX 494, p. 930, 3/24/42. DX 495, pp. 931–32, 4/2/42.
[997] GX 5545, p. 6364, 10/29/41. GX 5106, p. 4670, 11/41. GX 5204, p. 4902, 10/4/39. GX 5542, p. 6346, 2/5/41. GX 5096, p. 4646, 7/29/41. GX 5541, pp. 6344–45, 12/20/38. DX 474, p. 909, 4/18/41. DX 555, pp. 1065–66, 10/10/41.
[998] GX 5542, p. 6346, 2/5/41. Martin, Tr. 6466–7, 6420.
[999] DX 543, pp. 1011–12, 1934.
[1000] GX 5106, p. 4670, 11/41. GX 5204, p. 4902, 10/4/39. GX 5542, p. 6346, 2/5/41. GX 5096, p. 4646, 7/29/41. GX 5545, p. 6364, 10/29/41.
[1001] DX 407, p. 792, 4/1/49. DX 493, p. 928, 1/5/45.

446

There is no proof duPont fixed the resale prices for cellophane charged by its agent, Brooks Paper Company.

447

DuPont sold cellophane to the West Coast area, also served by Zellerbach Paper Company, its agent. Cellophane customers in the area were aware of duPont's own prices as well as Zellerbach's.[1002] While prices were comparable, there is no proof duPont fixed, by agreement, prices charged by Zellerbach for duPont cellophane.

448

DuPont's price lists carry prices for both cellophane in rolls and cellophane in sheets. On area basis, duPont's sheet prices were higher than roll prices.[1003] DuPont's agent, H. D. Catty Co., at times purchased roll cellophane from duPont, cut it into sheets and sold the sheets. In 1945, H. D. Catty Co. inquired of duPont what spread duPont intended to have in duPont's prices for
1572 rolls and sheets.[1004] DuPont refused to interfere on a complaint by its agent, Zellerbach, Catty was reselling cellophane at a price lower than charged by Zellerbach.[1005]

449

In 1939 a duPont salesman had a discussion with Houston Paper Company, a jobber which had been reselling both duPont and Sylvania cellophane. The salesman sought to persuade Houston to buy duPont cellophane and, being unsuccessful, informed his superior Houston should be removed from a list of preferred jobbers. This was done.[1006] Thereafter, Houston's name erroneously appeared on a preferred jobber list.[1007] In calling attention to this, another duPont employee stated Houston should not be included, since it was handling competitive Sylvania cellophane, was a price cutter and was aggressively pushing Sylvania cellophane.[1008] There is no other evidence duPont attempted to control resale prices of any jobber of duPont cellophane.

[1002] GX 5480, p. 5375, 10/17/41.
[1003] GX 398, pp. 5504–43.
[1004] GX 5266, p. 5002, 2/13/45. GX 5267, p. 5003, 2/21/45.
[1005] GX 5508, p. 5417, 2/2/42. GX 5509, p. 5420, 3/2/44.
[1006] DX 491, p. 926, 11/20/39.
[1007] DX 492, p. 927, 1/30/40. GX 5319, p. 5106, 2/5/40.
[1008] GX 5318, p. 5105, 1/31/40.

450

DuPont employed a red and blue standard label bearing the legend "DuPont Cellophane".[1009] During the period 1938–1947 when converters were classified as "promotional" or "regular", both classes were permitted to use the standard label with the sale of their converted products, provided such use was in accordance with regulations established by duPont protecting its right to the standard label by insuring it would not be used on products made of cellophane not made by duPont.[1010]

1573 451

There is no proof fabricators were not permitted to use the duPont standard label. Fabricator contracts when duPont's registered trademark "Cellophane" was in wide use granted to fabricators the right to use duPont's trademark to identify fabricated products made from duPont cellophane.[1011]

452

DuPont issued a form of agreement covering use by customers of duPont's standard label in 1947.[1012] This agreement was offered to all customers, including those purchasing both Sylvania and duPont cellophane.[1013] As before, the label was to be used on products made of duPont cellophane.[1014]

453

Value of the duPont standard label was small. A converter was interested in promoting its own name rather than that of the producer of one of the flexible packaging materials it converted.[1015]

454

To broaden use of cellophane, duPont furnished sales and technical help to its customers. This help included work in the field, advice as to problems encountered in conversion and in use of converted products, chemical tests, merchandising literature, market surveys, reprints of consumer advertising, etc. DuPont provided such service both to customers buying exclusively from it and to customers purchasing from Sylvania as well as duPont.

[1009] GX 5378, p. 5188, 5/1/42.
[1010] GX 5378, p. 5188, 5/1/42. GX 5420, p. 5281, 3/25/43. GX 5373, p. 5182. DX 407, pp. 789, 792, 4/1/49. Leeds, DX 1011, p. 85. Goland, DX 1015, pp. 177, 198.
[1011] GX 5504, p. 5249, 1/31/40. GX 5517, p. 5273, 10/1/41.
[1012] DX 502, p. 940, 1/47. DX 407, pp. 789, 792, 4/1/49. DX 371, p. 693, 2/7/47.
[1013] DX 371, p. 693, 2/7/47. DX 503, p. 941, 10/10/47.
[1014] DX 502, p. 940, 1/47.
[1015] Martin, Tr. 6420–21.

There is no proof the services furnished by duPont of this
1574 character to two-source converters differed in quality or amount from that furnished to converters purchasing only from duPont.[1016]

455

As of April 1, 1949, duPont's distribution practices are summarized:

1. Prices were based on a minimum of 500 pounds of rolls or a case of sheets. Smaller orders were referred to jobbers or converters.

2. Discount from list price on domestic sales was a functional discount to any customer that purchased materials for processing (printing, bag making, etc.) and subsequent resale for packaging uses.

3. No sales agreements between duPont and any customer existed for domestic sales.

4. Remaining wholesale distributors were two companies acting as exclusive distributors of roll cellophane to the dairy industry for use as hoods for milk bottles. Material ordered by these companies was prepared at a special price, without discount. Other resellers of non-processed duPont cellophane were jobbers who purchased at net prices and had neither exclusive territories nor any territorial limitations. Jobbers set their own resale price schedules and there was no suggested resale price schedule by duPont.

5. Use of the standard label, a red, white and blue insignia with the words, "DuPont Cellophane", was available to all customers.

6. Business outside of the continental United States and Canada was handled by the Export Section, covering every
1575 country in the world where import licenses and exchange conditions permitted sales. Export business was normally handled through distributors who were given exclusive resale franchises in designated territories, cancellable on 60 days' notice. Foreign distributors were given discounts and commissions of 5% on rolls and 10% on sheets.

7. DuPont's policy was export business on rolls should return a net profit equal to domestic sales and export roll prices were higher than United States roll prices. On sheets export was regarded as an outlet for production in excess of domestic requirements and export prices for sheets were the same as the United States prices.[1017]

[1016] Goland, DX 1015, pp. 177, 187–88. Hanson, DX 1018, pp. 247, 259. Leeds, DX 1011, pp. 79, 83–85. DX 455–90, pp. 887–925.
[1017] DX 407, pp. 789–793, 4/1/49.

D. PATENTS WERE NOT ABUSED

(Findings 456–532)

456

Plaintiff conceded for purposes of this case claims of all patents involved are valid. It conceded validity of duPont's trademarks.[1018] No evidence was offered as to abuse of trademarks.[1019]

457

DuPont never applied for a cellophane patent not based on research done by it.[1020] Only half of proposals by research personnel for patent applications were submitted as applications, the remainder were rejected by duPont's patent personnel because the discovery was not patentable.[1021]

458

DuPont's reason for filing applications on its inventions
1576 was to prevent others from filing an application, securing a patent, and preventing duPont from enjoying the benefits of its own research either in production or as basis for further research. DuPont desired to obtain patents on results of its research so to feel secure in employing its own discoveries.[1022]

459

Criteria by which duPont decided whether to file a patent application were technical merit of discovery and its possible utility in the operations of duPont.[1023]

460

When a duPont research worker made discovery pertinent to cellophane, he forwarded a patent proposal to the Patent Service Section of the Rayon Department. Patent Service made a preliminary study. The Patent Steering Committee then considered advisability of applying for a patent. This decision turned upon the technical merit of discovery and its possible utility in company operations. If decision of the Patent Steering Committee was favorable, Patent Service would search prior art, develop the facts, to serve as basis for patent application. Upon filing of

[1018] Minieus, Tr. 6960–64.
[1019] See Findings 450 and 452 as to the standard label.
[1020] W. W. Smith, Tr. 6509.
[1021] W. W. Smith, Tr. 6506.
[1022] GX 2821, p. 6081, 5/5/31. W. W. Smith, Tr. 6507–08.
[1023] W. W. Smith, Tr. 6528.

the application, the Patent Board of the Company was advised. This Patent Board consisted of representatives from each operating department, the Legal Department, Chemical Department, Engineering Department and Foreign Relations Department.[1024]

461

DuPont's Executive Committee exercised control over patent license agreements. It issued policy statements for the guidance of Company management and personnel as to the Company's policies with respect to patents and procedures to be followed.[1025]

1577

462

DuPont's patent policy was to apply for U. S. patents to protect its expenditures for research and development. Policy was to seek patents on inventions which might have commercial value:

(1) Inventions duPont intended to practice in its manufacture.

(2) Auxiliary inventions covering modifications which may be found practical to introduce in duPont's manufacture.

(3) Inventions covering uses of duPont's products.

(4) Inventions which may be a source of income.[1026]

Dupont preferred to utilize its inventions in its own manufacture, rather than to exploit them by licenses. It was prepared to consider licensing of inventions it might not be able to use itself or where demand for products embodying invention could not be met by duPont alone.[1027]

463

Since 1938 duPont had a specific policy no license of a duPont patent should be conditioned upon use of duPont products.[1028]

464

DuPont never acquired any patent for purpose of suppressing the patent and not using it.[1029]

465

DuPont never applied for a patent to cellophane for the purpose of blocking third parties from developing their
1578 inventions or for fencing off others from patenting inventions relating to an area in which duPont held patents.[1030]

[1024] W. W. Smith, Tr. 6492–6500.
[1025] DX 661, p. 1365, 11/2/38. DX 662, p. 1375, 4/2/47.
[1026] DX 661, p. 1365, 11/2/38. DX 662, p. 1375, 4/2/47.
[1027] DX 661, p. 1366, 11/2/38. DX 662, p. 1376, 4/2/47.
[1028] DX 661, p. 1367, 11/2/38. DX 674, p. 1498, 11/27/42. DX 662, p. 1377, 4/2/47.
[1029] W. W. Smith, Tr. 6535.
[1030] W. W. Smith, Tr. 6508–09. Mitchell, Tr. 5502–03.

DuPont's patent policy was to apply for U. S. patents to protect patents. Patents were considered only a by-product of that work.[1031]

466

When duPont did not apply for a patent on results of its research, it found itself blocked from using results when others later obtained patents on the same development.[1032]

467

DuPont acquired rights under patents relating to cellophane owned by others. In each case, the patent was studied and decision made as to whether rights would be acquired. DuPont did not acquire any patent right it did not believe had possible utility in its manufacture or sales.[1033]

468

DuPont on some occasions obtained patent rights on customer use inventions, for the purpose of being free to promote use of duPont cellophane by customers without exposing them to possible infringement proceedings.[1034]

469

DuPont acquired patents relating to use of cellophane. Examples of this are:

1579 (a) Wertheimer patent relating to ribbons.[1035]

(b) Patents relating to the closure of cellophane bags.[1036]

(c) Patents relating to adhesives.[1037]

(d) Patents relating to sealing.[1038]

470

There are 7000 United States patents relating to the cellophane art.[1039] During the period 1924–1947, duPont had rights under

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[1031] Mitchell, Tr. 5503.

[1032] W. W. Smith, Tr. 6508. DX, p. 1386, 5/25/31. DX 664, p. 1391, 1/10/36. DX 665, p. 1392, 6/29/39. DX 666, p. 1395, 7/3/39. DX 667, p. 1396, 10/6/39. DX 668, p. 1397, 10/9/39.

[1033] W. W. Smith, Tr. 6528, 6535, 6599. GX 2017, p. 2075, 10/22/41. GX 2018, p. 6081, 2/7/35. GX 2816, p. 6082, 2/19/37. GX 2817, p. 6083, 12/15/38. GX p. 6081, 2/7/35. GX 2816, p. 6082, 2/19/37. GX 2817, p. 6083, 12/15/38. GX 2818, p. 6084, 4/10/39. GX 2819, p. 6085, 12/9/31. GX 2826, p. 6094, 12/19/34. DX 675–683. DX 689–710.

[1034] DX 663, p. 1386, 5/25/31. DX 670, p. 1402, 11/22/32. DX 671, p. 1403, 5/23/44. GX 2626, p. 2087, 2/27/45. GX 2105, p. 2220, 12/30/31. GX 2814, p. 6080, 7/6/34.

[1035] DX 726, p. 1522, 1/10/33. DX 670, p. 1402, 11/22/32. DX 487, p. 6460, 1/23/33.

[1036] DX 671, p. 1403, 5/23/44.

[1037] DX 709, p. 1461, 12/27/37.

[1038] DX 663, p. 1386, 5/25/31.

[1039] W. W. Smith, Tr. 6627.

368 patents relating to cellophane and 49 relating to caps and bands.[1040] Plaintiff conceded for purposes of this action validity of all claims of all patents.[1041] Of the 368 relating to cellophane, as of January 1, 1952, 102 had expired and 266 were in force.[1042]

471

DuPont had neither intent nor power to subvert the use of trademarks, trade secrets or know-how relating to cellophane.

472

Of the 368 patents relating to cellophane which were issued to duPont, 68 were customer use patents which duPont as a manufacturer would not use. Of the remaining 300, duPont had used 93 in its commercial operations, or 31%.[1043]

1580 473

Patents under which duPont had rights were not put into use by duPont due to difficulties not foreseen when it filed the patent application. Such included:

(a) Critical material required for the practice of the invention was not available in commercial quantities.[1044]

(b) Critical material required for the practice of the invention, although available in commercial quantities, had such a high cost the process was less desirable than other processes.[1045]

(c) During the period between filing the patent application and issue of the patent, now technology developed that gave better results than the patented discovery.[1046]

(d) Invention that operated under laboratory conditions could not be applied to commercial operation under plant conditions.[1047]

474

A patent application is filed soon after invention so as to have an early filing date. At time of making application the question of whether the invention will have commercial utility is a matter of judgment rather than certainty.[1048]

[1040] W. W. Smith, Tr. 6517.
[1041] Minieus, Tr. 6960–64.
[1042] W. W. Smith, Tr. 6517.
[1043] W. W. Smith, Tr. 6517–18.
[1044] W. W. Smith, Tr. 6519–20.
[1045] W. W. Smith, Tr. 6519–20.
[1046] W. W. Smith, Tr. 6521.
[1047] W. W. Smith, Tr. 6522.
[1048] W. W. Smith, Tr. 6519–20.

requiring consent of the other party to further licensing. DuPont rejected these proposals.[1126] After negotiation, duPont consented to a provision in the contract that would require each party to give 30 days' notice to the other before granting further licenses.
1593 This provision was for notice and did not limit right of either party to grant further licenses under its patents.[1127]

511

DuPont's reason for entering ultra violet light protective film cross-licenses was it was charged by Sylvania with infringement, and desired freedom to develop sales of ultra violet protective cellophane.[1128]

512

There is no proof any person other than duPont and Sylvania wanted to manufacture ultra violet protective cellophane, or ever asked duPont or Sylvania for a license under a patent relating to such film.

513

In 1939 when the ultra violet license agreement between duPont and Sylvania was made, ultra violet protective film was an insignificant product sold at a premium over the price of other cellophane.[1129] It remained a high priced specialty [1130] and accounted for less than ½ of 1% of duPont sales in 1947.[1131]

514

Settlements of interferences declared by the United States Patent Office are a recognized way of resolving disputes between rival applicants. An interference proceeding is a proceeding which if carried through the stage of testimony can be quite expensive in both time and money.[1132]

1594 515

DuPont settled by agreement interferences declared by the United States Patent Office between duPont patent applications relating to cellophane and patent applications of others.[1133] DuPont's policy was it was always willing to make a reasonable

[1126] W. W. Smith, Tr. 6633–34.
[1127] W. W. Smith, Tr. 6634–38. GX 2191, p. 2450. GX 2192, pp. 2451–52. GX 2193, p. 2455. GX 2194, pp. 2456–57. GX 2195, pp. 2458–59. GX 2196, p. 2460. GX 2197, pp. 2461–67.
[1128] W. W. Smith, Tr. 6629. W. W. Smith, Tr. 6638. GX 2197, p. 2461, 10/18/37.
[1129] GX 2197, p. 2461, 10/18/37.
[1130] GX 396, p. 5490, 5/15/50.
[1131] GX 395, p. 5488, 5/15/50. GX 396, p. 5490, 5/15/50.
[1132] W. W. Smith, Tr. 6547.
[1133] GX 2001, p. 2030 (Schedule C).

475

There is no proof the chemical industry puts to commercial use as much as 30% of patent rights available.

476

Average percentage of commercial use of patents in the
1581 duPont Company is from 30% to 32% of patent rights available, as compared to 31% of its rights under cellophane patents.[1049]

477

As of January 1, 1952, duPont owned or had rights under 266 existing patents relating to cellophane.[1050] Of these 113 related to moistureproof cellophane, and the balance of 153 to plain cellophane or to customer use.[1051] Of those relating to moistureproof cellophane, 30 had been licensed to duPont non-exclusively by the American Solvent Recovery Company, and 11 more had been licensed to duPont non-exclusively by Marbo Patents, Inc.[1052]

478

During period 1929–1952, duPont had rights under 158 U. S. patents relating to the manufacture of moistureproof cellophane.[1053] Of these, 104 had been issued to duPont. Of these, 47 related to moistureproofing compositions, 5 related to slip agents, 1 related to mold inhibitors, 19 related to heat sealing, 22 related to anchorage of coatings, 8 related to process and apparatus, and 2 related to solvent recovery.[1054] Of the 54 patents relating to moistureproof cellophane that had been licensed to duPont, 30 related to solvent recovery and 11 related to rubber derivative coatings and materials.[1055] Of these 54, 41 were licensed to duPont on a non-exclusive basis

479

Of the total 158 patents relating to moistureproof cellophane, under which duPont had rights sometime during the period
1582 1924–1952,[1056] duPont's rights under 54 had been acquired from others.[1057] None of these 54 could have been employed to prevent the manufacture of moistureproof cellophane and none

[1049] W. W. Smith, Tr. pp. 6518–19.
[1050] W. W. Smith, Tr. 6517.
[1051] W. W. Smith, Tr. 6514, 6526.
[1052] W. W. Smith, Tr. 6524, 6533.
[1053] W. W. Smith, Tr. 6513–14.
[1054] W. W. Smith, Tr. 6526.
[1055] W. W. Smith, Tr. 6524–6533.
[1056] W. W. Smith, Tr. 6514.
[1057] W. W. Smith, Tr. 6535.

would have enabled a manufacture of moistureproof cellophane absent a license from duPont under the basic product patent during the period it was in force.[1058]

480

During the period 1929–1946 it was not possible to manufacture moistureproof cellophane in the United States without infringing duPont's basic product patent, No. 1,737,187.[1059] During the period 1931–1948 a moistureproof cellophane could have been physically manufactured without infringing duPont's four basic process patents, but there is no proof such a non-infringing method of manufacture would have been practical on a commercial basis.[1060]

481

There is no proof existence of any U. S. patent relating to cellophane licensed to duPont from third parties contributed in any degree to volume of duPont's sales of cellophane.

482

There is no proof existence of any U. S. patent relating to cellophane licensed to duPont from third parties broadened duPont's right under its own patented inventions to exclude others from manufacture and sale of moistureproof cellophane.

483

Satisfactory plain and moistureproof cellophane can be manufactured in the U. S. today without infringing any existing patents issued, licensed or assigned to duPont.[1061]

1583

484

DuPont did not use any patent relating to cellophane to threaten others. On three occasions it brought actions for infringement. One such suit was brought against Sylvania and was based on the five original patents relating to moistureproof cellophane. This suit was settled by stipulation.[1062] The second action was against two manufacturers of ribbons of cellophane and was based on certain patents covering specific types of ribbons. This was settled by consent decree.[1063] The third action was on a customer use patent, which related to the sealing of cellophane. DuPont by contract was obligated to sue infringers and did so.[1064]

[1058] W. W. Smith, Tr. 6514, 6530.
[1059] W. W. Smith, Tr. 6539.
[1060] W. W. Smith, Tr. 6582.
[1061] Mitchell, Tr. 5529–31.
[1062] Yerkes, Tr. 6928–36. GX 2001, pp. 2027–29, Schedule B.
[1063] GX 2128, p. 2268, 1/8/37. GX 2001B, supra.
[1064] GX 2173, p. 2899, 11/30/31. GX 2001B, supra.

A number of claims were held invalid by the trial court, and duPont did not appeal.[1065]

485

DuPont in 1939 granted Marathon Paper Mills Company a non-exclusive, non-assignable license under its moistureproof product patent 1,737,187 to coat plain cellophane with a defined rubber wax moistureproofing composition and to sell the coated film for the packaging of cheese.[1066] The royalty payable was 2¢ per pound of the coated film.[1067] Marathon acknowledged validity of the patent licensed,[1068] and the agreement was limited to the period of that patent.[1069] Marathon did not desire a license to manufacture moistureproof cellophane itself.[1070] The product it made under the duPont license was used to package cheese.[1071]

1584

486

Sylvania, which was duPont's exclusive licensee under the 1933 Agreement as amended in 1938, consented to duPont's license to Marathon in 1939 under the product patent and the 1933 Agreement was modified to the extent duPont was free to license Marathon.[1072] Royalties from Marathon under its license of the moistureproof product patent were divided 1/3 to Sylvania and 2/3 to duPont.[1073] Upon termination of the 1933 Agreement and grant of a non-exclusive license to Sylvania under the moistureproof product patent on January 1, 1945,[1074] all Marathon royalties were payable to duPont alone until expiration of the product patent in 1946.[1075]

487

During the term of its license, Marathon could purchase non-moistureproof film from either duPont or Sylvania for coating.[1076]

488

The license to Marathon by duPont expired on November 26, 1946, with the expiration of duPont's product patent 1,737,187.[1077]

[1065] GX 2188, p. 2442, 9/23/36.
[1066] GX 2515, p. 3291, Para. 1, 3, p. 3292, 9/19/39.
[1067] GX 2515, p. 3291, Para. 4, p. 3294, 9/19/39.
[1068] GX 2515, p. 3291, Para. 3, p. 3293, 9/19/39.
[1069] GX 2515, p. 3291, Para. 2, p. 3292, 9/19/39.
[1070] Croy, DX 1021, pp. 346–47.
[1071] DX 408, p. 794, 10/1/48. GX 11, pp. 87–90, 3/27/45. GX 2524, p. 3309, 11/30/39. Croy, DX 1021, p. 334. Wilcox, DX 1013, pp. 123–24.
[1072] GX 2515, p. 3287, Para. 1, p. 3288, 9/19/39.
[1073] GX 2515, p. 3287, Para. 2, p. 3288, 9/19/39.
[1074] GX 2755, p. 3642, 1/1/45.
[1075] DX 717, p. 1484, 2/6/45. DX 718, p. 1485, 2/6/45. DX 719A, p. 1487, 6/29/45.
[1076] GX 2523, p. 3308, 11/30/39. GX 2526, p. 3313, 2/22/40.
[1077] GX 2914, 6/29/45. GX 2515, p. 3291, 3293, 9/19/39. DX 719, p. 1486, 6/29/45.

489

When Marathon decided to make cheese wraps by applying its rubber-wax coating to non-moistureproof cellophane, it obtained from duPont a license under duPont's product patent 1,737,187 which enabled Marathon to make the wrap it was interested in producing. Despite its right under the license to apply its
1585 coating to plain cellophane, Marathon did not operate under the license long. It determined use of moistureproof cellophane as a base for its coating made a better wrap, and used moistureproof film. Application of Marathon's coating to this film did not require a license or payment of royalty.[1078] Marathon's royalties to duPont were $1.77 in 1944 and zero in 1945.[1079] Despite expiration of the product patent in 1946, Marathon has continued to make its cheese wrap from moistureproof cellophane.[1080]

490

Late in 1940, Marathon inquired whether duPont would be willing to broaden Marathon's license under duPont's moistureproof patent to include the coating of plain cellophane with Marathon's rubber wax composition for use as wrappers for ground and processed meats.[1081] DuPont declined and suggested Marathon coat moistureproof film. DuPont offered technical assistance for problems encountered in such coating.[1082] Marathon was not deeply interested in coating plain cellophane for meat wrappers and did not press for extension of its license to enable that use.[1083]

491

Marathon has not been interested in manufacture of cellophane, even when duPont offered to license its patents and technology. Cellophane manufacture would have been a departure from Marathan's business. Marathon preferred to invest its financial resources in other directions.[1084]

492

In 1930, duPont and Dobeckmun Company entered into agreement where Dobeckmun could receive within the
1586 United States technical information from Kalle with respect to lamination of moistureproof cellophane, and was

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[1078] Croy, DX 1021, pp. 335-36.
[1079] GX 499, p. 6835, 1/25/46.
[1080] DX 719, p. 1486, 7/29/45. Croy, DX 1021, p. 336.
[1081] Croy, DX 1021, pp. 337-39. GX 2909, 12/3/40. GX 2910, 1/15/42. GX 2911, 1/29/42.
[1082] GX 2912, 2/10/41.
[1083] Croy, DX 1021, pp. 337-39.
[1084] Croy, DX 1021, pp. 346-47.

granted non-exclusive license with respect to patents duPont might obtain for the process and apparatus used in such lamination. The agreement provided Dobeckmun would use only cellulose sheets made by duPont. At the time of agreement, duPont was the only manufacturer of moistureproof cellophane in the United States and it had the right to make moistureproof cellophane in the United States, its moistureproof cellophane product patent having then issued and having not been licensed in any way.[1085] In 1938, duPont waived the provisions in the Dobeckmun agreement by which Dobeckmun agreed to use only duPont cellophane in operations under the agreement.[1086]

493

In 1931, duPont was the only manufacturer of moistureproof cellophane. Dobeckmun Company obtained a patent on the heat sealing of moistureproof cellophane, and Humitube Company obtained a patent on the sealing of moistureproof cellophane.[1087] These companies were interested in using the patents in the manufacture and resale of moistureproof cellophane tubes for cigars. DuPont purchased these patents. It agreed to grant Dobeckmun and Humitube, and no one else, licenses to manufacture and resell cigar tubes as described in the patents.[1088] DuPont at that time had no "Promotional Converters" as such, and there is no proof either Dobeckmun or Humitube was bound by contract to purchase all moistureproof cellophane from duPont. On advice of counsel, duPont licensed the sealing patents generally, except for manufacture of a specified size of cigar tubes for resale, by a label attached to shipments of duPont moistureproof cellophane.[1089]

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494

DuPont acquired patents covering sealing of moistureproof cellophane to remove a source of annoyance to its customers and to avoid the possibility the patents might be used to retard expansion of the use of cellophane. The patents covered the principles of sealing used in automatic wrapping machinery.[1090]

495

In connection with acquisition of sealing patents from Dobeckmun and Humitube, duPont agreed to sue infringers manufactur-

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[1085] GX 2921, p. 7855, 9/19/30. W. W. Smith, 6539. GX 403.
[1086] GX 2922, 12/19/38.
[1087] GX 2001A; GX 2172, p. 2395, 6/9/31.
[1088] GX 2173, p. 2397, 11/12/31. GX 2174, p. 2403, 11/25/31. GX 2178, p. 2422, 12/4/31.
[1089] GX 2180, p. 2428, 4/13/32. GX 2181, p. 2430, 4/20/32.
[1090] GX 2831, p. 6194, 6/11/31.

ing and selling cigar tubes of the dimensions defined in the Dobeckmun patents.[1091] Because of this obligation, duPont brought an infringement suit against Vis-O-Tube.[1092] Sylvania, in 1935, suggested settlement of the suit, Vis-O-Tube being its customer, by a license from duPont to Sylvania under the sealing patents. DuPont felt it was obligated to prosecute the suit and refused to settle.[1093] The sealing patents were adjudged invalid in 1936, and duPont did not appeal.[1094]

496

In 1933, Saniwrap Company sought to purchase moistureproof cellophane from duPont to manufacture cigar tubes which would infringe the Dobeckmun patents. On advice of counsel, duPont refused to sell. Representatives of the Federal Trade Commission then called on Humitube, Dobeckmun, and duPont and reviewed the contracts pursuant to which the patents had been acquired by duPont and licensed to the other companies.[1095] After discussion of these with duPont management and legal counsel, the FTC representatives informed duPont there were no
1588 grounds for valid complaint against duPont in connection with the sealing patents.[1096]

497

In licensing its ribbon patents to customers in 1931–1933 duPont reserved right to cancel the license at will on 30 days' notice.[1097] There is no proof duPont ever communicated to a customer any thought the licenses might be cancelled if other cellophane were used to make the patented ribbons, and there is no proof duPont ever exercised its 30-day cancellation clause in the ribbon licenses for any reason. Since 1938, duPont had a specific policy no license of a patent shall be conditioned upon the use of duPont's products.[1098]

498

DuPont granted royalty-free licenses to certain customers under patents covering specific types of cellophane ribbons. The patents were Brandenberger 1,406,148, Wertheimer, 1,543,634, Cohn,

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[1091] GX 2173, p. 2399, 11/12/31.
[1092] GX 2186, p. 2440, 8/3/33. GX 2188, p. 2442, 9/23/36.
[1093] GX 2187, p. 2441, 9/25/35.
[1094] GX 2188, p. 2442, 9/23/36.
[1095] GX 2183, pp. 2435–36, 5/15/33.
[1096] GX 2185, pp. 2438–39, 12/12/33.
[1097] GX 2104, p. 2219, 12/29/31. GX 2105, p. 2220, 12/30/31. GX 2106, p. 2222. GX 2107, p. 2225, 2/11/32. GX 2108, 2/26/32. GX 2109, p. 2233, 10/4/33.
[1098] DX 661, p. 1367, 11/2/38. DX 674, p. 1408, 11/27/42. DX 662, p. 1376, 4/2/47.

1,958,033, and Lees, 1,849,747.[1099] DuPont acquired patent rights under these patents in order to secure freedom for customers in the use of cellophane.[1100] Patent rights were acquired in 1923, 1932, 1933 and 1936.[1101]

499

DuPont brought infringement suits on two ribbon patents
1589 against the Hy-Sil Co.[1102] Sylvania, which sold cellophane to Hy-Sil, suggested settlement on a royalty basis with an understanding royalties would be accumulated to finance prosecution of infringers.[1103] DuPont rejected this arrangement as a patent pool.[1104] After negotiations, duPont licensed Sylvania under all four ribbon patents, by two agreements of April 1, 1937. These licenses were non-exclusive, with the right to sub-license to a stated number of manufacturers of ribbons. A royalty was payable by Sylvania to duPont on the net selling price of ribbons manufactured under the licenses. Sylvania was free to pay the royalty or to pass it on to its sub-licensees. DuPont agreed not to grant more than a stated number of additional licenses.[1105]

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April 1, 1937 agreements between duPont and Sylvania were terminated in March 1940.[1106]

501

No proof was offered the number of licenses and sub-licenses permitted to duPont and Sylvania under the ribbon license agreements of April 1, 1937, did not exceed the number of actual customers the companies had, for ribbon manufacturing. Sylvania had three customers classed as fabricators, which would include ribbon manufacturers, in 1935, 1940, and 1945.[1107] There is no proof any company unsuccessfully sought a license under the ribbon patents to manufacture ribbons. Sylvania granted
1590 one sub-license under the ribbon patents, although under its agreement with duPont it was entitled to more than one.[1108]

[1099] GX 2146, pp. 2354–57, 2/18/38. GX 2147, pp. 2358–61, 2/18/38. GX 2107, pp. 2224–26, 2/11/32. GX 2108, pp. 2228, 22230, 2/26/32. GX 2109, pp. 2223–33. GX 2142, p. 2336, 2/18/38.

[1100] DX 726, p. 1522, 1/10/33. DX 670, p. 1402, 1/22/32. GX 2886, p. 6196; 1/23/33. GX 2115, pp. 2445, 2247, 7/31/33.

[1101] GX 2001–A, GX 2128, p. 2266, 1/8/39.

[1102] GX 2128, p. 2267, 1/8/37.

[1103] GX 2128, p. 2267, 1/8/37.

[1104] GX 2128, p. 2267, 1/8/37.

[1105] GX 2132, p. 2278, 4/1/37. GX 2133, p. 2293, 4/1/37.

[1106] DX 728, p. 1525, 12/30/39. DX 729, p. 1526, 1/22/40. DX 730, 1527, 2/2/40.

[1107] GX 414, p. 5618.

[1108] DX 729, p. 1526, 1/22/40.

502

Cellophane used for ribbons was non-moistureproof cellophane for a specialty use. DuPont sales of cellophane for that purpose amounted to less than 1% of the total sales in 1938.[1109]

503

DuPont on May 20, 1942, granted a non-exclusive license to Sylvania under Snyder U. S. Patent 2,087,008.[1110] Glycerine and glycerol were in short supply.[1111] This patent covered use of ethylene glycol as a softener for moistureproof cellophane, in place of glycerol. Due to its volatile character, ethylene glycol could not be used in non-moistureproof film, but only in film that was to be coated. Sylvania was practicing the invention and wanted a license. Since the patent was related to manufacture of moistureproof film, the royalty of 2% of selling price was waived on products on which Sylvania paid a royalty under the 1933 Agreement.[1112]

504

Use of the invention in the Snyder patent was not limited to moistureproof film, which was why duPont granted a separate license for that patent. The ingredient was not a component of the moistureproof coating, but of the base film.[1113]

1591 505

On April 9, 1943, duPont and Sylvania entered into an agreement by which duPont licensed two Cupery patents, 2,142,115 and 2,142,116 to Sylvania, and Sylvania licensed its Cornwell Patent 442,202 and Morgan Patent 2,288,413 to duPont.[1114] The term of the licenses was six months after the cessation of the war or three years from date of contract, whichever was shorter.[1115] The licenses were non-exclusive, royalty-free, and were limited to regenerated cellulose film, but not limited to moistureproof cellophane.[1116] The license agreement was negotiated at arm's length as a separate transaction.[1117]

[1109] GX 2139, pp. 2330, 2332, 2/11/38.
[1110] GX 2534, pp. 3327–31, 5/20/42.
[1111] GX 496, 6769, 1/11/43. GX 495A, p. 6703, 1/21/42.
[1112] GX 2530, p. 3318, 4/1/42. GX 2531, p. 3321, 4/6/42.
[1113] DX 731, pp. 1528–29, 8/31/37. GX 2530, p. 3318, 4/1/42.
[1114] GX 2051, pp. 2122–24, 4/9/33.
[1115] GX 2051, p. 2122, Para. 4, pp. 2123–24, 4/9/33.
[1116] GX 2051, p. 2122, Para. 1, 2, 3, pp. 2123–24, 4/9/33.
[1117] GX 2063, pp. 2142–43, 6/7/43. GX 2044, pp. 2113–14, 3/12/43. GX 2050, pp. 2120–21, 3/29/43. DX 723, p. 1517. DX 724, p. 1519.

506

DuPont needed a license under Sylvania's Morgan Patent to permit it to use ethylamine hydrochloride as a softener because of wartime shortage of glycerine. The ingredient was useful for flame-proofing, which was necessary in cellophane duPont was manufacturing for war use. Sylvania needed a license under duPont's two Cupery patents to cover its use of ethanolamine sulfonate as a softening and flame-proofing agent in its types of cellophane for war uses.[1118]

507

DuPont and Sylvania entered into agreement on October 22, 1937, which provided for a non-exclusive, non-assignable, royalty-free license to Sylvania under duPont's Hunter patent 2,062,179,
and a similar license to duPont of Sylvania's Morgan patent
1592 2,043,860.[1119] Both patents were concerned with cellophane
which gave protection against ultra violet light and were so related neither duPont nor Sylvania could develop light protective wrappers without infringing the patent of the other.[1120]

508

DuPont performed research which formed the basis for its Hunter ultra violet patent.[1121] This patent dominated Sylvania's Morgan patent on ultra violet light protective cellophane, but it was theoretically possible to practice the Morgan patent without infringing the Hunter patent.[1122]

509

DuPont's negotiation of the cross-license of the Hunter and Morgan patents was an arm's length transaction.[1123] There was no understanding between the parties other than the formal agreement.[1124]

510

In negotiating the ultra violet light protective film licensing agreement, duPont proposed non-exclusive licenses royalty-free.[1125] Sylvania proposed price fixing provisions and provisions

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[1118] GX 2050, pp. 2120–21, 3/29/43. GX 2044; p. 2113, 3/12/43. GX 2063, p. 2142, 6/7/43.
[1119] GX 2198, p. 2463, 10/22/37.
[1120] GX 2197, p. 2641, 10/18/37.
[1121] DX 720A, pp. 1495–1501, 10/32. DX 721A, p. 1502, 1/31/34.
[1122] GX 2197, p. 2461, 10/18/37. GX 2190, p. 2190, 5/27/37.
[1123] W. W. Smith, Tr. 6629–39. GX 2191, p. 2450, 6/8/37. GX 2192, p. 2451, 6/30/47. GX 2193, p. 2455, 7/13/37. GX 2194, p. 2456, 7/28/37. GX 2195, p. 2458, 8/3/37. GX 2196, p. 2460, 8/6/37.
[1124] W. W. Smith, Tr. 6638.
[1125] DX 1004, 3/2/37. W. W. Smith, Tr. 6632–33.

settlement that did not impair its rights under its basic cellophane patents.[1134]

516

Each settlement of the 15 interferences as to which evidence was received in this action was a separate transaction, except in instances where several interferences were settled by a single agreement. There was no over-all agreement between duPont and any party to an interference.[1135]

517

There is no proof any parties to the interferences other than duPont and Sylvania ever had any intention or desire to engage in the manufacture of cellophane.[1136]

518

Eight of the 15 interferences involved moistureproofing compositions relating to resin wax.[1137] No one could have practiced the inventions to coat plain cellophane with such wax and produce moistureproof cellophane without infringement of duPont's basic product patent, 1,737,187.[1138]

519

There is no proof duPont did not settle the patent interferences in good faith and no proof all rights duPont obtained in the interference settlements extended duPont's cellophane manufacture or sales to any measurable degree.

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520

There is no proof upon which validity of patent claims involved in interferences settled by duPont can be determined,[1139] and plaintiff conceded all claims issued to duPont were valid.[1140]

521

Interference 63558 concerned use of cellulose tubes for covering a golf club grip. Priority on all counts was awarded to duPont. The invention was never commercially successful. Under settlement agreement, Spalding obtained an exclusive license to sell if it

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[1134] W. W. Smith, Tr. 6547.
[1135] W. W. Smith, Tr. 6548.
[1136] W. W. Smith, Tr. 6548–49.
[1137] W. W. Smith, Tr. 6561.
[1138] W. W. Smith, Tr. 6515, 6567–68.
[1139] McAuliffe, Tr. 2804–05, 2823–24.
[1140] Minieus, Tr. 6960–62.

maintained a stated volume of business. It did not maintain volume, and the license became non-exclusive.[1141]

522

Interference 74629 involved aluminum rolls for drying cellophane in the process of manufacture. Priority as to invention was divided as to various claims. DuPont received an exclusive license with the right to sub-license limited to regenerated cellulose.[1142]

523

Interference 74837 with the American Can Company concerned a greaseproof container, in which cellophane could be a component. The product was never a commercial success. DuPont thought it was the senior party by a considerable period, but in fact American Can Company won priority.[1143]

524

Interferences 69624 and 73939 involved claims by duPont,
1596 Union Carbide & Carbon Company, Eastman Kodak Company, Hazel Atlas Glass Company, and Sylvania, as to resin wax moistureproofing compositions. DuPont considered technology involved was important, but thereafter the invention lost technical significance and made a negligible contribution to cellophane technology. The interferences were settled by bargaining between the parties. DuPont was willing to settle only if there was no effect on duPont's basic moistureproof position, for the resin wax coating, if applied to plain cellophane, would produce a product within claims of duPont's basic patent. DuPont obtained in the settlement exclusive rights to the invention so far as they concerned moistureproof cellophane.[1144] Carbide also got from settlement what it wanted.[1145] DuPont's inventor was prior on all counts. The resin wax patents involved in these interferences are on the Register of the United States Patent Office available for licensing and no company involved in the interference has sought a license from duPont.[1146]

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Interferences 71448 and 71449 involved claims by duPont, Eastman Kodak, and Swann Company (Monsanto) with respect to

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[1141] GX 2001C, p. 2031. W. W. Smith, Tr. 6566–67
[1142] GX 2001C, p. 2031. W. W. Smith, Tr. 6563–64.
[1143] GX 2001C, p. 2032. W. W. Smith, Tr. 6564–66.
[1144] W. W. Smith, Tr. 6549–52
[1145] Davidson, Tr. 5869–72.
[1146] W. W. Smith, Tr. 6628.

estergum wax. DuPont would settle if it got exclusive rights to use such wax compositions on regenerated cellulose film, and obtained such rights in the settlement agreement. Its basic product patent would have been infringed by moistureproof cellophane produced by coating plain cellophane with estergum wax compositions.[1147] DuPont considered its chances of winning the interference good.[1148] The subject of the interference was cellulose acetate film, as to which the settlement granted exclusive rights to Eastman.[1149]

1597 526

Interference 70341 involved claims of duPont and Monsanto for a specific type of resin wax of possible utility for moistureproofing cellophane.[1150] DuPont was willing to settle to save expense of litigating the interference, but only if it could obtain exclusive rights to the wax for coating moistureproof cellophane, since the resin wax if applied to plain cellophane would produce a product within the claims of duPont's basic product patent.[1151] Settlement gave duPont an exclusive license with unlimited right to sublicense, to make, use and sell the wax for manufacturing moistureproof cellophane and cellophane coated with wax.[1152] DuPont's application was filed two years before Monsanto, and it expected to win priority, but priority was eventually awarded to Monsanto.[1153] DuPont's rights to use for manufacturing moistureproof cellophane the wax covered by the patent involved in the interference are available for licensing and Monsanto has not sought a license.[1154]

527

Interferences 68801 and 68197 concerned claims by Eastman Kodak and duPont as to plasticizers for films. These were settled by the exchange of royalty-free nonexclusive licenses.[1155]

528

Interference 72191 involved claims of duPont and Eastman Kodak for a specific plasticizer useful in a coating composition.

Settlement was reached by negotiation between the com-
1598 panies.[1156] DuPont obtained an exclusive license to the claims, so far as they affected regenerated cellulose film, with the right to sublicense.[1157]

[1147] W. W. Smith, Tr. 6555–58. GX 2001C, p. 2032.
[1148] GX 2862, p. 6153, 10/2/35.
[1149] W. W. Smith, Tr. 6557.
[1150] W. W. Smith, Tr. 6552–53.
[1151] W. W. Smith, Tr. 6552–53, 6612. GX 2854, p. 6141, 3/1/35.
[1152] W. W. Smith, Tr. 6613–14. GX 2379, p. 2883, 11/18/37.
[1153] W. W. Smith, Tr. 6553. GX 2854, p. 6141, 3/1/35. GX 2915, 8/12/38.
[1154] W. W. Smith, Tr. 6627–28.
[1155] W. W. Smith, Tr. 6563.
[1156] W. W. Smith, Tr. 6562–63.
[1157] GX 2387, p. 2906, 10/29/36.

529

Interference 73673 involved claims of duPont, Goodyear Tire & Rubber Co. and Marsene, with respect to a specific resin in a resin wax moistureproofing composition. Originally Marsene was eliminated by the Patent Office, and duPont and Goodyear then negotiated a settlement agreement. Marsene appealed and was reinstated. This vitiated the agreement with Goodyear. Interference was litigated; Marsene won priority; and duPont's patent issued with one narrow claim.[1158]

530

Interference 71566 involved claims of duPont and Marbo Company with respect to rubber hydrochloride. Its relation to cellophane was the possibility of using this as a component of a moistureproof coating composition.[1159] DuPont was unwilling to settle unless it could obtain rights that would cover the use of the composition for producing moistureproof cellophane that would fall within the claims of its basic product patent.[1160] Under the settlement it obtained an exclusive license under the patent for the use of synthetic rubber in the coating of moistureproof cellophane.[1161]

531

Interference 68654 concerned claims of Hercules Powder Company and duPont to a specific resin that might be useful in moistureproof coatings.[1162] After negotiations, the interference was settled by an exclusive license to duPont, royalty-free, for use of the composition on cellophane and a royalty-free license
1599 to Hercules for use of the composition on certain other materials.[1163] DuPont's inventors were prior as to use of the composition on cellophane. The Hercules inventor was prior on specific counts as to use of the material with paper.[1164]

532

After duPont's basic product patent on moistureproof cellophane, 1,737,187, had issued in 1929, the United States Patent Office in 1931 declared Interference 63420 between this patent and an Eaton application owned by Rosenberg.[1165] DuPont believed

[1158] W. W. Smith, Tr. 6559–61.
[1159] W. W. Smith, Tr. 6561–62.
[1160] GX 2468, pp. 2989–92, 11/15/35.
[1161] GX 2418, p. 3008, 4/8/36.
[1162] W. W. Smith, Tr. 6554.
[1163] GX 2462, p. 3195, 8/3/36.
[1164] W. W. Smith, Tr. 6555.
[1165] GX 2802, p. 6057. GX 2803, p. 6059, 3/21/32.

Rosenberg had no case, but offered to purchase the Eaton application for $10,000 to avoid a possible interference suit and for its nuisance value. Rosenberg rejected this and asked at least $150,000.[1166] DuPont then presented its evidence. After hearing it, Rosenberg's patent counsel conceded he had no case and suggested settlement,[1167] which was effected by duPont paying $5,000 for the Eaton application. This was what it would have cost duPont to complete prosecution of the interference proceeding.[1168]

XII. DuPont Did Not Conspire to Monopolize

A. WITH SYLVANIA

(Findings 533–591)

1. Patent License Agreement

(Findings 533–583)

533

Sylvania began manufacture of moistureproof cellophane after issuance to duPont of its basic product patent 1,737,187 on
1600 November 26, 1929.[1169] Sylvania's manufacture and sale of moistureproof cellophane infringed the claims of this patent,[1170] as Sylvania was aware.[1171]

534

Sylvania conducted manufacture of moistureproof cellophane without obtaining a license from duPont after the issuance to duPont on October 6, 1931 of U. S. Patents 1,826,696–1,826,699, which covered coating compositions useful in the manufacture of moistureproof cellophane and apparatus and processes for its manufacture.[1172] Sylvania developed a process and moistureproofing composition which avoided the claims of these four patents. It used a three ingredient coating composition rather than the four ingredient composition patented by duPont.[1173] Sylvania's non-infringing composition and process were more expensive to operate than those patented by duPont and produced

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[1166] GX 2802, p. 6057.
[1167] GX 2804, p. 6060, 11/15/33.
[1168] GX 2804, p. 6060, 11/15/33. GX 2805, p. 6063, 11/15/33. GX 2806, p. 6064, 11/17/33.
[1169] Yerkes, Tr 6929.
[1170] GX 2482, pp. 3204, 3205, 2/18/31. Yerkes, Tr. 6929. Reichel, Tr. 6038, 6039.
[1171] Yerkes, Tr. 6928. Reichel, Tr. 6038–39. GX 2482, p. 3204–05, 2/18/31. GX 2478, p. 3181, 11/19/31.
[1172] GX 2478, p. 3181, 11/19/31.
[1173] DX 343, p. 4007, 1934. Reichel, Tr. 6038–39.

moistureproof cellophane inferior in quality to that made under the duPont process and composition patents.[1174]

535

Sylvania in February 1931, advised duPont it planned to manufacture moistureproof cellophane and duPont informed Sylvania the product patent would be enforced.[1175] In July 1931, Sylvania approached duPont with the suggestion Sylvania would allow duPont to use a newly developed ingredient for moistureproof cellophane, if duPont would agree not to take action on Sylvania's infringement of duPont's product patent. DuPont rejected this suggestion and informed Sylvania it proposed to defend the product patent, but offered to license Sylvania non-exclusively under all present and future moistureproof patents at a royalty of 3% of the selling price and with Sylvania
1601 sales to be limited to 10% of total sales of moistureproof. Sylvania declined.[1176]

536

On November 19, 1931, duPont notified Sylvania of infringement of the moistureproof patents stating unless assurances were given infringement had ceased duPont would take steps to protect its rights under its patents.[1177] An action against Sylvania for infringement of moistureproof patents was filed in the United States District Court for the District of Delaware on January 28, 1932,[1178] and refiled in Virginia in January, 1933.[1179] The suit charged infringement of duPont's five basic moistureproof patents.[1180]

537

DuPont was confident of validity of its five moistureproof patents.[1181] After filing suit, it engaged in preparation for trial.[1182]

538

After duPont's infringement action against Sylvania was commenced counsel for Sylvania suggested the case should be set-

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[1174] Reichel, Tr 6038–39.
[1175] GX 2482, pp. 3204–05, 2/18/31. GX 2475, p. 3177, 2/26/31.
[1176] GX 2478, p. 3181. GX 2483, p. 3206, 7/13/31.
[1177] GX 2478, pp. 3181–82. GX 2810, p. 6072, Nov. 1931. GX 2479, p. 3183, 1/28/32. GX 2480, p. 3192.
[1178] GX 2478, pp. 3181–82. GX 2479, p. 3183, 1/28/32.
[1179] GX 2478, p. 3182.
[1180] GX 2479, p. 3183, 1/28/32.
[1181] Yerkes, Tr. 6932–33, GX 2811, p. 6073, 6075, 8/4/32. GX 2469, p. 3160, 8/26/30.
[1182] GX 487, p. 6463, 1/23/33. GX 489, p. 6491, Dec. 1934. DX 725, p. 1521, 1/24/33.

tled.[1183] Negotiations between the parties led to a license agreement, dated April 26, 1933, pursuant to which the infringement suit was withdrawn.[1184]

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Neither party dictated the terms of the license agreement by which the suit was settled.[1185]

1602 540

DuPont did not settle its patent suit against Sylvania by a licensing agreement because of lack of faith in its patents or it feared other methods of moistureproofing might soon be found, or because it desired to minimize competition by restricting the number of manufacturers.[1186]

541

DuPont settled its infringement suit against Sylvania and licensed Sylvania under its moistureproof patents. DuPont's reasons were there was always a possibility duPont would not win the suit, and even if duPont did win, it would have licensed Sylvania anyway.[1187]

542

Sylvania's reason for settling the infringement suit by the moistureproof license was it had been unable to avoid infringement of duPont's product patent and there was risk validity of that patent would be sustained, and because the process Sylvania had developed to avoid duPont's composition and process patents was more expensive, so it was economical to settle on a reasonable royalty basis rather than to continue to bear high production costs.[1188]

543

The 1933 Agreement between duPont and Sylvania did not provide for the license of future patents without additional fee.[1189] DuPont never had understanding with Sylvania in connection with the 1933 Agreement the two companies would present a united front to keep other people from manufacturing cellophane.[1190]

[1183] GX 2811, pp. 6073–74, 8/4/32. Yerkes, Tr. 6931.
[1184] GX 2486, p. 3210, 8/9/32. GX 2485, p. 3208, 8/11/32. GX 2487, p. 3212, 1933. Yerkes, Tr. 6931, 6933–34. Carpenter, Tr. 6283. Reichel, Tr. 6037–38.
[1185] Yerkes, Tr. 6931–36.
[1186] Yerkes, Tr. 6933–34.
[1187] Yerkes, Tr. 6932–33. Carpenter, Tr. 6283–85.
[1188] Reichel, Tr. 6038–39.
[1189] GX 2487, pp. 3212, 3216–19, 4/26/33.
[1190] Yerkes, Tr. 6935.

1603 544

DuPont offered Sylvania a non-exclusive license, but in course of negotiations for settlement of the suit the license to be granted was at Sylvania's request made exclusive.[1191]

545

The 1933 Agreement contained these terms:

(1) The patents licensed were 1,737,187 and 1,826,696–99, all issued to duPont and consisting of duPont's basic product patent and its four composition and process patents.[1192]

(2) DuPont granted to Sylvania a license to manufacture, import and sell moistureproof cellophane in the United States, its territories and possessions.[1193]

(3) DuPont agreed to grant Sylvania, at Sylvania's election, licenses under future patents granted to or acquired by duPont, provided the inventions claimed related to moistureproof cellophane and fell within the scope of the five recited patents.[1194]

(4) Sylvania agreed to grant to duPont, at duPont's election, a license under any future patent granted to or acquired by Sylvania prior to October 6, 1948 where the inventions claimed were concerned with the manufacture of moistureproof cellophane and fell within the scope of the five recited patents.[1195]

(5) Licenses granted under the agreement did not obligate the licensee to operate under the licensed patent, and could not
1604 be sub-licensed or assigned, except in connection with the transfer of the entire business of the party.[1196]

(6) Licenses granted under the contract extended to October 6, 1948 (the expiration date of duPont's composition and process patents), provided licenses under future patents should continue as to patents under which either of the parties had begun commercial manufacture prior to October 6, 1948.[1197]

(7) Election of a party to take a license under a future patent was required to be made within three months of notice from the other party to exercise the right to election, and the right to a license under the patent expired otherwise.[1198]

(8) Sylvania agreed to pay duPont royalty of 2% of its net selling price of all moistureproof cellophane sold by Sylvania for use within the United States, its territories and possessions, mois-

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[1191] Yerkes, Tr. 6935. GX 2483, p. 3206, 7/13/31. GX 2487, p. 3212, 4/26/33.
[1192] GX 2487, p. 3212, Par. 1, p. 3213, 4/26/33.
[1193] Id. Par. 1, p. 3212.
[1194] Id. Par. 2, p. 3213.
[1195] Id. Par. 3, pp. 3213–14.
[1196] Id. Pars. 4, 16, pp. 3214, 3226–27.
[1197] Id. Par. 5, pp. 3214–15.
[1198] Id. Par. 5, p. 3215.

tureproof cellophane being defined in the language of U. S. Patent 1,737,187.[1199]

(9) Sylvania agreed to pay duPont the 2% royalty on products sold by Sylvania for use within the United States, its territories and possessions, when such products were licensed under future duPont patents, provided the 2% royalty under future patents should be in addition to that payable under the five recited patents only if such future patents covered different processes from those claimed in the five recited patents. The maximum royalty was 2% for the five recited patents and 2% for all future patents, or a total of 4%.[1200]

(10) If duPont acquired a license under a future patent
1605 of Sylvania, it was obligated to pay a royalty of 2% of the net selling price of the licensed product sold by it for use within the United States, its territories and possessions, provided the future patent covered different processes from those covered by the five recited patents. The maximum royalty payable by duPont under such future patents was 2%.[1201]

(11) Each of the parties was required to keep records of its sales and imports under the provisions of the agreement, and make quarterly reports to the other showing quantities of goods sold and royalties due. Such records were subject to inspection by the other party. Royalties were payable quarterly with the submission of the quarterly report.[1202]

(12) The royalty payments by Sylvania would be increased to 20¢ per pound or 30% of the net selling price, whichever was greater, on all licensed articles sold by Sylvania for use in the United States, its territories and possessions, constituting quantities in excess of 20% of the combined annual sales of moistureproof cellophane during 1933 of duPont and Sylvania in that area. For each year for nine years subsequent to 1933, 1% was added to the 20% to mark the limit for the corresponding year above which the additional royalty was to be paid. After 1942, percentage of combined sales of moistureproof cellophane which Sylvania might make in the area without imposition of the additional royalty was 29% in each year. Additional royalties were computed on an annual and not a quarterly basis. Each party was required to keep records and permit examination of them by the other to determine additional royalties.[1203]

(13) Royalty payments duPont was obligated to make were
1606 increased by 20% or by 30% of the net selling price of the licensed articles, whichever was greater, on all such licensed articles sold by duPont for use in the United States, its territories

[1199] Id. Par. 6, p. 3215.
[1200] Id. Par. 8, pp. 3216–17.
[1201] Id. Par. 9, pp. 3218–19.
[1202] Id. Par. 10, pp. 3219–20.
[1203] Id. Par. 11, pp. 3220–21.

and possessions, and constituting quantities in excess of 80% of the combined annual sales of duPont and Sylvania of moistureproof cellophane as licensed by Sylvania to duPont during 1933 in that area. For each year for nine years subsequent to 1933, 1% was deducted from the 80% to mark the limit for the corresponding year above which duPont was obligated to pay the additional royalty. After 1942, percentage of the aggregate sales of the articles licensed under Sylvania patents, which duPont could make without imposition of the additional royalty, would be 71%. Similar provisions as to annual payment of the royalty and keeping of the records were included as in the case of Sylvania's additional royalty.[1204]

(14) If a third party infringed any patent under which a license had been given under the contract in such a way as to affect sales of licensed material by licensee, licensor was required to sue to stop the infringement, and if it did not do so licensee could discontinue payment of royalty under the infringed claim; if the infringement related to the five recited duPont patents, Sylvania could terminate the agreement; if the infringement related to patents other than the five recited duPont patents, licensee could file suit against the infringer.[1205]

(15) DuPont agreed it would not grant a license to a third party under the five recited patents in respect to the subject matter licensed to Sylvania without Sylvania's consent. Each party agreed it would not grant to any third party any license under the future patents covered by the agreement during the three
1607 months period within which the other party had a right to obtain a license, or at any time while a license so acquired remained in force, unless duPont and Sylvania agreed to the terms of the license to the third party.[1206]

(16) Sylvania represented at the date of the execution of the contract it had no U. S. patent relating to the manufacture of moistureproof cellophane, and duPont represented as of the same date it had no U. S. patent relating to the manufacture of moistureproof cellophane except the five recited patents.[1207]

(17) Sylvania acknowledged validity of the five recited patents for the period and for the scope of Sylvania's licensed operations under them. DuPont and Sylvania agreed they would not assist others in infringing or contesting validity of any patent under which a license was granted pursuant to the agreement.[1208]

(18) The right of each party to examine the records of the other as to articles manufactured and sold under the agreement

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[1204] Id. Par. 12, pp. 3221–22.
[1205] Id. Par. 13, pp. 3222–25.
[1206] Id. Par. 17, p. 3227.
[1207] Id. Par. 20, pp. 3228–29.
[1208] Id. Par. 22, pp. 3229–30.

was stated not to include any right to inspect the plants or processes of the other, or to acquire any confidential information concerning plants or processes or other confidential matters.[1209]

546

The 1933 Agreement contained the understandings between the parties and there was no side agreement of any kind.[1210]

547

DuPont was advised by counsel in connection with its negotiation of the 1933 Agreement and the attorneys approved the agreement at the time it was made.[1211]

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No person connected with Sylvania ever stated to any duPont official Sylvania considered the 1933 Agreement to be illegal.[1212]

549

There was no understanding between duPont and Sylvania for the exchange of patents or technology.[1213]

550

DuPont had no understanding with Sylvania to pool patents and did not exchange patent applications with Sylvania.[1214]

551

The 1933 Agreement did not apply to plain cellophane, only to moistureproof cellophane. It did not provide for exchange of technology. It contained no provisions for fixing of prices or limitation on Sylvania's right to export. It required no payment of royalty on export sales and no royalty on any sales of non-moistureproof cellophane.[1215]

552

At the time of the 1933 Agreement, Sylvania owned no rights under any patent relating to moistureproof cellophane; duPont

[1209] Id. Par. 25, pp. 3231–32.
[1210] Yerkes, Tr 6931–32.
[1211] Yerkes, Tr. 6936.
[1212] Yerkes, Tr. 6936. Reichel, Tr. 6676–78, 6702.
[1213] W. W. Smith, Tr. pp. 6541–43. Reichel, Tr. 6050. Yerkes, Tr. 6931–32.
[1214] W. W. Smith, Tr. 6542. Reichel, Tr. 6049–50.
[1215] GX 2487, p. 3212, 4/26/33.

owned basic patents on its inventions of the product moistureproof cellophane, of moistureproofing compositions, and of processes of manufacture. Consequently, no rights relating to moistureproof cellophane passed to duPont from Sylvania at the time of the 1933 Agreement.[1216] The 1933 Agreement was co-extensive in scope with the claims of duPont's product patent 1,737,187 on moistureproof cellophane, and did not apply to plain
1609 cellophane.[1217] At the time of the 1933 Agreement, Sylvania was consciously infringing that patent.[1218] No technical information was licensed under the 1933 Agreement, and neither Sylvania nor duPont at any time transmitted such information to the other.[1219] No patent applications were exchanged pursuant to the Agreement.[1220] No competing processes were licensed.[1221] The 1933 Agreement was terminated January, 1945, two years prior to the expiration of duPont's basic product patent.[1222]

553

DuPont administered the 1933 Agreement according to its terms.[1223]

554

DuPont considered the merit of Sylvania patents as they were issued and when it decided the patent did not fall within the terms of the 1933 Agreement, did not assert a right to obtain a license under the Agreement.[1224]

555

Since execution of the 1933 Agreement, duPont and Sylvania entered into agreements in settlement of patent interferences,[1225] or granted licenses to each other on patents not within the scope of the 1933 Agreement.[1226] Each of these transactions was made individually after arm's-length negotiations and not pursuant to any understanding between duPont and Sylvania.[1227]

[1216] Reichel, Tr. 6038–39. GX 1, p. 14, 2/17/44. Yerkes, Tr. 6929.
[1217] W. W. Smith, Tr. 6603–05.
[1218] Reichel, Tr. 6038–39. Yerkes, Tr. 6928. GX 2482, pp. 3204–05, 2/18/31. GX 2478, p. 3181, 11/19/31.
[1219] W. W. Smith, Tr. 6541–43. Reichel, Tr. 6050. GX 1, p. 17, 2/17/44.
[1220] W. W. Smith, Tr. 6542.
[1221] W. W. Smith, Tr. 6539.
[1222] GX 2737, p. 3606, 1/1/45.
[1223] W. W. Smith, Tr. 6536–37, 6541.
[1224] DX 714, p. 1478, 5/11/42. DX 715, p. 1480, 9/9/43. DX 716, p. 1482, 1/2/45. W. W. Smith, Tr. 6536–37.
[1225] GX 2001, pp. 1954, 2031. GX 2036, p. 2659, 8/31/42.
[1226] W. W. Smith, Tr. 6540–41. GX 2198, p. 2463, 10/22/37. GX 2531, p. 3321, 4/6/42. GX 2051, p. 2122, 4/9/43. GX 2132, p. 2278, 4/1/37. GX 2133, p. 2293, 4/1/37. GX 2295, p. 2646, 8/7/42.
[1227] Reichel, Tr. 6050. W. W. Smith, Tr. 6548.

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In determining whether it would take a license from Sylvania, duPont did not consider as a factor Sylvania would be free to license others.[1228]

557

The 1933 Agreement had no obligations or any agreement as to lines of business other than the manufacture and sale of moistureproof cellophane.[1229]

558

During the life of the 1933 Agreement duPont obtained licenses from Sylvania on nine patents relating to moistureproof cellophane. DuPont reviewed the value of these patents from time to time, but none of them was of any significance and none was used by duPont in its operation. There is no proof of any third party ever sought or desired a license under any of these nine Sylvania patents.[1230]

559

None of the nine patents licensed by Sylvania to duPont pursuant to the 1933 Agreement enhanced duPont's position in the manufacture of cellophane.[1231]

560

It was not possible to manufacture moistureproof cellophane under one or all of patents licensed by Sylvania to duPont.[1232]

561

The patents licensed to Sylvania by duPont under the 1933 Agreement were used by Sylvania in all its production of moistureproof cellophane. In making a non-heat-sealing
1611 moistureproof cellophane, Sylvania used seven patents, five of which were licensed to it by duPont.[1233] In making a heat-sealing anchored moistureproof cellophane, Sylvania used thirteen patents, eleven of which were licensed to it by duPont.[1234] In making various other types of moistureproof films, Sylvania used nineteen patents, fifteen of which were licensed to it by duPont.[1235]

[1228] W. W. Smith, Tr. 6540.
[1229] GX 1100, p. 1208, 5/24/33.
[1230] DX 715, p. 1480, 6/9/43. DX 716, p. 1482, 2/2/45. GX 2741, p. 3624, 5/1/44. W. W. Smith, Tr. 6537, 6540–41.
[1231] W. W. Smith, Tr. 6537–39. GX 2741, pp. 3624–25, 5/1/44.
[1232] W. W. Smith, Tr. 6539.
[1233] DX 711, pp. 1463, 1467, 1/7/44. GX 2568, p. 3372.
[1234] DX 711, pp. 1463, 1469, 1/7/44. GX 2568, p. 3372.
[1235] DX 711, pp. 1463, 1470, 1/7/44. GX 2568, p. 3372. GX 403.

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There is no proof any person other than Sylvania desired a license from duPont to engage in the manufacture of moistureproof cellophane during the life of the five basic duPont patents. Marathon Corporation in the late 1930's, and several other companies during World War II, desired to purchase plain cellophane and apply it to a moistureproof coating or laminate.[1236] Marathon was licensed to engage in coating plain cellophane for cheese packaging.[1237] Other persons who desired to coat plain cellophane they purchased from cellophane manufacturers were not licensed.[1238]

563

DuPont licensed seven companies at times under one or more of its five basic moistureproof patents. The identity of the licensees was as follows:[1239]

(1) #1,737,187—Sylvania.
Marathon Corporation.

(2) #1,826,696—Riegel Paper Company.
Rhinelander Paper Company.
Pyroxylin Company.
Eastman Kodak Company.
Sylvania.

1612 (3) #1,826,697—Riegel Paper Company.
Rhinelander Paper Company.
Hercules Powder Company.
Sylvania.

(4) #1,826,698—Riegel Paper Company.
Rhinelander Paper Company.
Hercules Powder Company.
Sylvania.

(5) #1,826,699—Riegel Paper Company.
Rhinelander Paper Company.
Hercules Powder Company.
Eastman Kodak Company.
Pyroxylin Company.
Sylvania.

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At the time of execution of the 1933 Agreement, the provision for additional royalty was academic, since Sylvania's production

[1236] GX 2524, p. 3309, 11/30/39. GX 2512, p. 3283, 6/11/45. GX 2717, p. 3564, 8/4/42. GX 2698, p. 3539, 2/24/42.
[1237] GX 2515, p. 3287, 9/19/39. GX 2524, p. 3309, 11/30/39.
[1238] GX 2718, p. 3565, 6/29/43. GX 2698, p. 3539, 2/24/42.
[1239] GX403.

of moistureproof cellophane was below the 20% allowed in the initial year.[1240]

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During the period of April 1933–January 1, 1945, when the 1933 Agreement was in force, Sylvania could have sold in the United States without paying additional royalty of 20¢ per lb. 53,718,658 lbs. of moistureproof cellophane manufactured under its licenses from duPont. This would have amounted to a 31.4% increase in its domestic sales of moistureproof cellophane during the period of the Agreement.[1241]

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Sylvania's domestic sales of moistureproof cellophane under the 1933 Agreement, percentage such sales bore to combined domestic sales and percentage of combined sales Sylvania could have 1613 sold without paying additional royalty of 20¢ per lb, are shown for the years the 1933 Agreement was in force:

Year	Sylvania sales subject to 1933 agreement	Sylvania sales as percentage of combined domestic sales	Percentage of total Sylvania could sell without payment of 20c royalty
1933	2,287,595	12.7	20
1934	5,404,645	17.4	21
1935	7,517,440	20.4	22
1936	9,972,998	21.2	23
1937	10,948,310	20.6	24
1938	13,019,458	22.8	25
1939	14,615,780	21.2	26
1940	15,893,742	20.7	27
1941	20,208,342	20.7	28
1942	23,731,356	24.9	29
1943	23,933,070	22.7	29
1944	23,300,455	22.8	[1242] 29

567

Sylvania was advised at each quarter by duPont of percentage of total domestic sales of moistureproof cellophane Sylvania had achieved in that quarter.[1243] The application of excess royalty for sales in excess of the percentage stated in the Agreement was on an annual rather than a quarterly basis.[1244]

[1240] DX 712, p. 1471.
[1241] DX 712, p. 1471.
[1242] DX 712, p. 1471.
[1243] Reichel, Tr. 6687. GX 2487, pp. 312, 3219, 4/26/33. GX 2639, p. 3468, 11/20/35. GX 2681, p. 3515, 1/28/36.
[1244] GX 2487, pp. 3212, 3219, 4/26/33.

568

Sylvania's plans for expansion of production were never affected by the existence of the 1933 Agreement. Sylvania never followed a policy of curtailing its production.[1245]

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Royalties paid by Sylvania under the 1933 Agreement did not impair Sylvania's ability to compete with duPont.[1246]

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Royalties paid by Sylvania under the 1933 Agreement amounted to less than 1¢ per pound.[1247]

571

Sylvania paid duPont approximately $1,500,000 in royalties under the 1933 Agreement during its effectiveness from April 1933 to January 1, 1945.[1248] In addition to obtaining rights under duPont's basic product patent Sylvania benefited from the Agreement by being able to use duPont's patented compositions and processes which were more economical than Sylvania's independent composition and process.[1249] Royalties never prevented Sylvania from expanding its production, and Sylvania never considered the royalties an impediment to its ability to produce and expand.[1250] Its policies as to expansion in no way changed following the termination of the 1933 Agreement in 1945,[1251] although the new 1945 Agreement had no provision for increased royalty rates based on any amount of moistureproof cellophane sold.[1252]

572

The royalty provisions in the 1933 Agreement did not apply to sales of plain cellophane or exports of moistureproof cellophane.[1253] They did not apply to sales of cellophane made under patents of the selling party, but only to sales which the
1615 party made of products licensed under patents of the other party.[1254] Without being required to pay any royalty whatever to duPont, Sylvania was free to sell any amount of plain

[1245] Reichel, Tr. 6042–44.
[1246] Reichel, Tr. 6048.
[1247] Reichel, Tr. 6088–89. DX 712, p. 1471.
[1248] GX 2748, p. 3633, 11/27/44.
[1249] Reichel, Tr. 6039, 6100–01.
[1250] Reichel, Tr. 6039, 6048.
[1251] Reichel, Tr. 6040.
[1252] GX 2755, p. 3642, 1/1/45. GX 2758, p. 3656, 1/18/45.
[1253] GX 2487, p. 3212, Para. 8, p. 3216, 4/26/33. Id. Para. 9, p. 3218.
[1254] Id. Para. 8, p. 3216. Id. Para. 9, p. 3218.

cellophane, any amount of moistureproof cellophane for export, and any amount of any cellophane utilizing solely Sylvania's own patents.

573

As there is no evidence of Sylvania's cost of manufacture,[1255] there is no proof if its domestic sales of moistureproof cellophane had ever exceeded the percentage of total domestic sales of moistureproof cellophane stated in the contract, payment of the extra royalty on the portion in excess would have caused Sylvania to take a loss on that portion of its moistureproof cellophane sales. There is no proof the additional royalty payable on excess sales would have caused Sylvania's entire sale of moistureproof cellophane to have been conducted at a loss.[1256]

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Although Sylvania expanded its productive capacity as its financial condition would permit, it never reached a percentage of domestic sales of moistureproof cellophane that entailed payment of the additional royalty.[1257]

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Sylvania's domestic sales of moistureproof cellophane approached the percentage in the 1933 agreement only in 1935.[1258] Sylvania continued to enlarge its production facilities, adding two casting machines in 1936 and an additional one in both 1937 and 1938.[1259]

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Sylvania increased the number of its casting machines in operation from twelve in 1934 to fifteen in 1935, seventeen in 1936, eighteen in 1937, and nineteen in 1938.[1260] It increased the number of its machines for applying moistureproof coating from six in 1935 to seven in 1936, and to ten in 1937.[1261] Its production of moistureproof cellophane increased from 8.3 million pounds in 1935 to 11.9 million pounds in 1936, and 13.9 million pounds in 1937. Sylvania's total cellophane production increased from 13.8 million pounds in 1935 to 20 million pounds

1616.

[1255] DX 1026.
[1256] Reichel, Tr. 6040–41.
[1257] Reichel, Tr. 6040–41. DX 712, p. 1471.
[1258] DX 712, p. 1471.
[1259] GX 410, p. 5596.
[1260] GX 410, pp. 5592, 5596.
[1261] GX 410, pp 5592, 5599.

in 1936, to 20.7 million pounds in 1937, and to 21.3 million pounds in 1938.[1262]

577

Sylvania's production of moistureproof cellophane and its proportion of national sales of moistureproof cellophane increased in the period of 1933–1936, following a license to Sylvania by duPont of product and process patents on moistureproof cellophane.[1263] The license enabled Sylvania to improve the quality of its moistureproof film.[1264] The license removed reluctance of some consumers to use the Sylvania moistureproof film because it infringed duPont patents.[1265]

578

Sylvania increased its assets from its organization until 1946, when it was acquired by American Viscose Corporation.[1266] American Viscose's total assets as of 1950 were approximately 272 million dollars.[1267] Much of its assets are devoted to production of products other than cellophane, notably rayon.[1268]

579

The 1933 Agreement was amended in 1938.[1269] The amendment eliminated the provision the consent of the other party had to be obtained before licensing a third party under patents licensed under the agreement,[1270] and substituted a provision that licenses granted under the agreement were exclusive rather than non-exclusive.[1271]

1617

580

The 1933 Agreement was terminated January 1, 1945.[1272]

581

DuPont and Sylvania entered into an agreement on January 1, 1945 (called the "1945 Agreement") which differed from the 1933 Agreement in the following ways:

(1) Licenses granted were non-exclusive rather than exclusive.[1273]

[1262] GX 410, p. 5592.
[1263] GX 542. DX 543, pp. 1004–08, 1016.
[1264] DX 543, p. 1008. Reichel, Tr. 6100–01.
[1265] DX 543, pp. 1007–08.
[1266] DX 538, p. 994, 1951. Reichel, Tr. 6018.
[1267] DX 538, p. 994, 1951.
[1268] Reichel, Tr. 6019.
[1269] GX 2488, p. 3238, 7/12/38
[1270] GX 2487, p. 3212, Para. 17, p. 3227, 4/26/33.
[1271] GX 2488, pp. 3238–40, 7/12/38. GX 2489, p. 3242, 7/19/38.
[1272] GX 2737, p. 3606, 1/1/45.
[1273] GX 2487, p. 3212, 4/26/33.. GX 2755, p. 3642, 1/1/45.

(2) Licenses granted applied only to patents specified in the agreement without any provision for the licensing of future patents.[1274]

(3) Royalties under the five original moistureproof patents, which were to expire in 1946 and 1948, were 1¾% of the net selling price during 1945, reducing ¼% per year to 1% in 1948.[1275]

(4) Royalties on patents licensed to Sylvania under the 1933 Agreement subsequent to its execution, and specified in the 1945 Agreement, were 2% of net selling price. This 2% rate was not cumulative, but on products sold by Sylvania under patents with different rates of royalty, the higher royalty rate was to apply.[1276]

1618 (5) DuPont was granted licenses under nine named Sylvania patents, under five of which it was to pay no royalty and under four of which royalty was 1% of net selling price.[1277]

(6) Each party agreed if it licensed the same patent to a third party under terms more favorable than those in the 1945 Agreement, it would notify the other party and give it the privilege of substituting the more favorable terms.[1278]

As in the 1933 Agreement, royalty payments applied only to sales in the United States, its territories and possessions, and were limited to sales of moistureproof cellophane as defined in duPont's basic product patent, 1,737,187.[1279]

582

During the quarter preceding expiration of duPont's four basic process patents in 1948, royalties from Sylvania were at a rate of approximately $40,000 per quarter. During the first two quarters of 1949 they dropped to slightly more than $3,000 per quarter. It seems the duPont patents widely used in Sylvania's production of moistureproof cellophane in addition to the product patent 1,737,187 were the process patents issued in 1931.[1280]

583

The 1933 Agreement did not have the effect of channeling to duPont from Sylvania technical information and significant patent rights. No technical information or patent application was transmitted.[1281] None of the 9 patents licensed to duPont had commercial significance.[1282]

[1274] GX 2755, Para. 1, pp. 3642–44, 1/1/45.
[1275] Id., Par. 2, pp. 3644–45.
[1276] Id., Par. 2(B), (C), p. 3645.
[1277] Id., Pars. 3, 4, pp. 3645–46.
[1278] Id., Par. 10, p. 3648.
[1279] Id., Par. 3, p. 3645.
[1280] GX 2920, p. 7853, 10/9/49.
[1281] W. W. Smith, Tr. 6541–43. Reichel, Tr. 6050.
[1282] W. W. Smith, Tr. 6537–40.

1619

2. Prices

(Findings 584–591)

584

There was no express or implied agreement between duPont and Sylvania as to prices either would charge for cellophane of its own manufacture.[1283]

585

DuPont established prices for its cellophane independently of Sylvania. There were no agreements as to what prices should be charged, one company would follow the prices of the other, or published prices would be observed. Proof does not support an inference of agreement between duPont and Sylvania as to prices.[1284]

586

DuPont changed prices for cellophane and without notice of any kind to Sylvania a change was planned.[1285]

587

When duPont made a price reduction on its cellophane during the period 1930–1947, Sylvania would obtain from its customers a copy of the new duPont price list, and thereafter, in order to remain competitive, would issue its own price list back dated to an effective date the same as on the duPont list. Although effective date of the two lists was the same, the lists were not issued to the trade at the same time.[1286]

1620

588

Identity of duPont and Sylvania price lists prior to 1947 was due to Sylvania's desire to obtain as high a price for its cellophane as it could and its inability to sell its product at higher prices in competition with duPont cellophane.[1287] During 1949 Sylvania's list prices were higher than those of duPont and its sales suffered as a result.[1288]

589

DuPont's price reductions did not diminish Sylvania's ability to compete with duPont. DuPont's price reductions appeared to

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[1283] Yerkes, Tr. 6947. Reichel, Tr. 6045.
[1284] Hamburg, Tr. 1619. Replogle, Tr. 1923. Reichel, Tr. 6045, 6069–73. Yerkes, Tr. 6947.
[1285] Hamburg, Tr. 1619. Replogle, Tr. 1923. Reichel, Tr. 6069. Yerkes, Tr. 6947.
[1286] Hamburg, Tr. 1619. Reichel, Tr. 6069–73.
[1287] Reichel, Tr. 6045–46. Reichel, Tr. 6069–6078.
[1288] Reichel, Tr. 6099. DX 591, p. 1128, 1951. DX 596, p. 1169, 4/7/50.

Sylvania to be normal in an expanding business and had the effect of stimulating business and opening up new uses.[1289]

590

Sylvania made profits throughout its existence, except during 1937 and 1938.[1290]

591

There is no proof duPont's prices were identical to those of Sylvania for sales to jobbers, agents, or for export.[1291]

B. WITH FOREIGN CONCERNS TO EXCLUDE IMPORTS

(Findings 592–645)

592

Cellophane produced by duPont has been manufactured with the use of the basic machinery and process obtained from
1621 La Cellophane.[1292] DuPont's developments in equipment and techniques for production of the base film have been improvements on Brandenberger's discovery of machinery and a process for manufacturing a film of thin transparent regenerated cellulose in continuous sheet form.[1293]

593

When La Cellophane licensed DuPont Cellophane Co. under its patents and secret processes for North and Central America, it reserved its patents and processes for itself in the rest of the world.[1294] La Cellophane continued to employ its patents and processes in the manufacture and sale of cellophane in areas outside North and Central America.[1295] Subsequently it licensed Kalle & Co., A. G., and British Cellophane, Ltd., exclusively under its patents and processes for certain countries.[1296]

594

Kalle & Co., A. G. (hereinafter referred to as "Kalle") prior to advent of World War II was a German corporation and then had

[1289] Reichel, Tr. 6045–46.
[1290] Reichel, Tr. 6074. DX 538, p. 994, 1951.
[1291] Cook, Tr. 2201, 2226–28. Hamburg, Tr. 1611–14.
[1292] Ernst, Tr. pp. 5341–67. DX 369, p. 689.
[1293] McCune, Tr. 5542–80. DX 369, p. 689.
[1294] GX 1001, p. 1, 6/9/23.
[1295] Answer, Par. 4, 16. Goland, DX 1015, pp. 178–80.
[1296] Answer, Pars. 4, 16. Goland, DX 1015, pp. 178–80.
[1296] Carpenter, Tr. 6290–92.

principal place of business at Wiesbaden-Biebrich, Germany.[1297] Prior to World War II Kalle manufactured plain cellophane in Germany under a license from La Cellophane for certain central European countries and China.[1298]

595

British Cellophane, Ltd. (referred to as BCL) is a United Kingdom corporation with principal place of business at London, England. It was formed as a jointly owned subsidiary of
1622 La Cellophane and Courtaulds, Ltd., and was such a subsidiary for some time thereafter. It produces cellophane in England.[1299]

596

By Article 6 of the Agreement of December 26, 1923, future licensees of La Cellophane should receive technical information and inventions of DuPont Cellophane Company free of charge.[1300] This provision was put into effect following La Cellophane's license to Kalle and to BCL, by DuPont Cellophane Company's entering into a technical exchange agreement with each of these concerns so that rights under patents and technical information were transmitted between duPont and each of La Cellophane's European licensees directly instead of indirectly through La Cellophane.[1301]

597

Canadian Industries Limited is a Canadian corporation with principal place of business in Montreal. It was organized by duPont and Imperial Chemical Industries, Limited in 1910 for the purpose of making explosives in Canada. Each of these companies owned approximately 42% of CIL voting stock, and each had four representatives on CIL's Board of Directors of fifteen directors. CIL manufactures a wide range of chemical products in Canada, including explosives, ammunition, alkali, fertilizer, nylon, cellophane, paints, artificial leather, general chemicals, etc.[1302] Total sales of CIL for 1950 were $120,669,602.00, of which cellophane accounted for 6.7%.[1303]

[1297] Answer, Par. 7.
[1298] Carpenter, Tr. 6290–92. GX 1396, p. 1805, 5/27/26. GX 1089, p. 1193, 10/4/29. GX 1091, p. 1195, 10/30/29.
[1299] Answer, Par. 5.
[1300] GX 1002, pp. 998–1003, 12/26/23.
[1301] Carpenter, Tr. 6209–92. GX 1, pp. 7–8, 2/7/44. GX 1087, pp. 1183–86, 5/7/29. GX 1199, pp. 1229–35, 5/3/35.
[1302] Swint, Tr. 6215.
[1303] DX 766, p. 1626.

598

Imperial Chemical Industries, Ltd. is not a manufacturer of cellophane.[1304]

1623 599

DuPont sub-licensed Canadian Industries Ltd. exclusively for Canada under the patents and processes it had received from La Cellophane.[1305]

600

DuPont put CIL in the cellophane business, furnishing all technical assistance, plant construction, engineering service, etc.[1306]

601

License agreements between duPont and La Cellophane, Kalle, BCL and CIL represented the only agreements between duPont and foreign manufacturers.[1307] Each of these agreements was carried out in accordance with its terms.[1308]

602

DuPont Cellophane Co. under its agreement with La Cellophane was licensed to use La Cellophane's technical information for manufacture and sale only in North and Central America.[1309] Kalle, BCL and CIL were each licensed by their separate agreements with duPont to use duPont's technical information for manufacture and sale only in the countries specifically covered by their respective licenses.[1310]

1624 603

Until October 17, 1940, duPont did not attempt to sell its cellophane, manufactured with the use of information received from La Cellophane, in countries where no license had been granted to it by La Cellophane.[1311]

[1304] Swint, Tr. 6219. GX 1143, p. 1302, 2/1/36.
[1305] Swint, Tr. 6219–20. DX 1002, 11/1/33. GX 1157, pp. 1346–47, 12/8/33.
[1306] Swint, Tr. 6219. Ernst, Tr. 5367.
[1307] Swint, Tr. p. 6234. Swint, Tr. p. 6206. Carpenter, Tr. p. 6273.
[1308] GX 1096, p. 1201, 2/16/32. GX 1099, p. 1206, 3/20/33. GX 1102, p. 1210, 4/27/34. GX 1119, p. 1261, 1/19/37. GX 1131, p. 1282, 8/22/38. GX 1132, p. 1283, 7/24/43. GX 1134, p. 1286, 1/5/45.
[1309] GX 1002, p. 1060, 12/26/23. GX 1001, p. 986, 6/9/23.
[1310] GX 1087, pp. 1183–86, 5/7/29. GX 1109, pp. 1229–35, 5/3/35.
[1311] GX 1273–76, pp. 1602–05, 10/17/40. GX 399, pp. 5569–70, 5/15/50. DX 794, p. 1682, 10/18/40. DX 799, p. 1695, 12/18/40.

604

On October 17, 1940, duPont notified Kalle, La Cellophane, BCL and CIL territorial limitations placed upon use of unpatented secret processes and technical information would no longer be observed.[1312] From date of this notice each of these companies was free to sell cellophane made with duPont secret processes in the United States except as barred by unlicensed patents. Immediately duPont made an effort to investigate and exploit foreign markets where it had not previously sold, and thereafter sold wherever it could get an order and obtain payment.[1313] These exports went to customers in Europe, the Far East, the Middle East, nearly every country of the British Commonwealth and India.[1314] DuPont competed in these markets with La Cellophane, BCL, Kalle, Wolff, and other European manufacturers, as well as Sylvania.[1315]

605

Since October 17, 1940, duPont has not observed any territorial limitations upon the import or export of cellophane.[1316]

1626 607

DuPont continues to sell cellophane to any market abroad where an order may be obtained.[1318] Sales have been limited in nearly all countries of the world because of foreign restrictions on payment in United States currency.[1319]

608

DuPont cancelled its technical exchange agreements with Kalle and with La Cellophane in 1941, when German authorities made it impossible for Kalle or La Cellophane to exchange technical information with duPont.[1320] DuPont cancelled its agreement with BCL in 1948.[1321] In each of these cases, cancellation was final and bona fide, and duPont ceased to conduct itself in accord-

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[1312] GX 1273–76, pp. 1602–05, 10/17/40.

[1313] DX 794, p. 1682, 10/18/40. DX 795–96, pp. 1683–89, 10/23/40. DX 798, p. 1693, 11/5/40. DX 799, p. 1695, 12/18/40.

[1314] GX 399, pp. 5569–70, 5/15/50.

[1315] GX 445, pp. 5822–24, 1/48. DX 593, pp. 1133–34, 1947. DX 594, p. 1140, 1948. DX 595, pp. 1151–52, 1949. DX 596, pp. 1171–72, 4/7/50.

[1316] Swint, Tr. 6215. GX 1273–76, pp. 1602–05, 10/17/40. DX 794 p. 1682, 10/18/40. DX 799, p. 1695, 12/18/40. GX 399, pp. 5569–70, 5/15/50. DX 791, p. 1677. DX 792, pp. 1678–79, 1951.

[1318] Swint, Tr. 6214–15. GX 399, pp. 5569–70, 5/15/50. DX791, p. 1677.

[1319] GX 580, pp. 7331–32, 8/8/50. DX 594, p. 1140, 1948. DX 803, p. 1784, 12/6/48. DX 596, pp. 1171–2, 4/7/50.

[1320] Answer, Par. 41. Swint, Tr. 6214. Yerkes, Tr. 6928. DX 759, pp. 1616–17, 3/26/41. GX 1278, pp. 1607–11, 3/17/41. GX 1279, pp. 1612–13, 3/26/41. GX 1280, pp. 1614–16, 3/26/41.

[1321] DX 765, pp. 1623–25, 8/1/48.

Since 1940, duPont has exported the following quantity of cellophane to countries from which it was previously barred from selling under the terms of the license from LaCellophane.

Country	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	1950
Angolia		1,951						110	3,899		
Australia			70,028	432,228	142,106	71,238					
Austria										20,098	
Azores			1,169								
Belgian Congo		1,652									498
Belgium									4,714	752	12,119
Canary Islands	4,075	3,007								966	
Celebes											
China		5,666	4,462						44,047		(1,887)
Denmark											5,395
Egypt	41,774	33,453									
England										11,226	
Ethiopia										7,119	7,434
Finland									1,086		
France										259	
Germany										1,729	
Greece									465	368	
Iceland	872		3,439	899	592				6,466		
India			119	614,909		542,306					8,554
Iran										5,787	1,243
Iraq			193,244	148,535	66,797	48,896			22,365		278
Italy										88,835	
Java	60,237	107,086	21,920							9,149	2,868
Liberia	46	95					76				
Luxembourg										4,372	21,887
Morocco (French)		373			2,302	2,443					
Netherlands									432		
New Zealand			45,158		4,492	1,943					
Palestine		711							1,074		
Philippine Is	123,466	173,864				27,202	129,094	166,012	159,900	210,311	492,745
Portugal	1,295	29,473	26,721	16,859	1,497				10,588		
Port E. Africa		1,126			881				3,922	3,186	
Siam											9,949
Spain								70			
Sumatra										958	
Sweden											23,547
Switzerland		10,877	104,874					3,391	8,545	88,667	122,175
Tangiers									2,184	139	
Union of S. Africa	2,444	35,438							93,952	165,242	79,484

Limitations that have prevented larger shipments have been:
(1) Wartime shortage of cellophane in the United States.
(2) Wartime restrictions on shipping.
(3) Wartime and postwar import and currency restrictions abroad.[1317]

[1317] DX 791, p. 1677, 1951.

ance with the cancelled agreements.[1322] The evidence contains no indication of possibility these agreements will be revived in any form.

609

DuPont Cellophane Company exchanged rights under technical information, inventions, patent rights, etc. as to cellophane with La Cellophane, Kalle, and BCL as provided for in the agreement of December 26, 1923 and in agreements with Kalle and BCL.[1323] This continued until the termination of these agreements.[1324] In contrast with the initial communication of the process from La Cellophane to duPont, the later exchanges did not disclose to duPont any important or commercially useful inventions or information.[1325]

1627 610

Rights under few patents of any importance were received by duPont from the foreign manufacturers of cellophane with whom duPont had technical exchange agreements. In all, 21 patents came from La Cellophane, 3 from BCL, and 14 from Kalle.[1326] This was less than half of the patents under which licenses were offered to duPont by these concerns.[1327]

611

Of the 21 patent rights received by duPont from foreign manufacturers with which it had technical exchange agreements, three related to moistureproof cellophane. One was obtained from Kalle, two from BCL, and none from La Cellophane.[1328]

612

DuPont did not file for United States patents equivalent to foreign patents on cellophane obtained by La Cellophane, Kalle, and BCL. DuPont actually filed for United States patents in less than half of the cases submitted to it by the foreign companies.[1329]

[1322] Swint, Tr. 6214–15. Yerkes, Tr. 6928. DX 760, p. 1618, 2/14/47. DX 761, p. 1619, 3/11/47. GX 399, pp. 5569–70, 5/15/50.
[1323] Mitchell, Tr. 5535. GX 1051, p. 1095, 6/23/32.
[1324] GX 1279, pp. 1612–13, 3/26/41. GX 1280, pp. 1614–16, 3/26/41. DX 765, pp. 1623–25, 8/1/48.
[1325] Mitchell, Tr. 5535. W. W. Smith, Tr. 6528–32.
[1326] W. W. Smith, Tr. 6528–32. Mitchell, Tr. p. 5535.
[1327] W. W. Smith, Tr. 6528.
[1328] W. W. Smith, Tr. 6530–32.
[1329] W. W. Smith, Tr. 6528.

613

There is no proof duPont received patents or technical information relating to cellophane from any European concern other than La Cellophane and its licensees Kalle and BCL, or any of these three transmitted any patent or technical information to duPont except as provided in their formal technical exchange agreements with duPont.

614

Transmission of technical information and patent rights to duPont by La Cellophane, BCL and Kalle, subsequent to 1628 the transmission to duPont by La Cellophane of the essential secret process and technical information, did not provide duPont with information or patent rights of any commercial importance. Evidence is uncontradicted the information duPont received relating to moistureproof cellophane had no value whatever to duPont and was never used,[1330] and inventions related to such inconsequential matters as the use of cellophane as cigarette paper or lamp shades, and coating compositions for which the ingredients were not available in the United States.[1331] The record does not indicate any such information or patent right received by duPont from these companies contributed in any way to duPont's productive efficiency or the volume of duPont sales of cellophane.

615

About 1924, Ernest Bleibler, Chief Engineer of La Cellophane, and one of the La Cellophane's principal sales and administrative personnel, absconded with blueprints and complete information as to La Cellophane's secret process for cellophane manufacture.[1332] These men, with financial support of a Belgian syndicate, founded the Belgian concern, Societe Industrielle de La Cellulose (SIDAC).[1333] This concern built a plant in Belgium after the French model, using La Cellophane's process and information.[1334]

616

After this, affiliates of SIDAC were founded in the United States, the United Kingdom and Italy, known as Sylvania, British SIDAC and Italian SIDAC.[1335]

[1330] Mitchell, Tr. 5535.
[1331] W. W. Smith, Tr. 6530–32.
[1332] Reichel, Tr. 6056; Ernst, Tr. 5365.
[1333] Reichel, Tr. 6056. GX 1, p. 12, 2/17/44.
[1334] Reichel, Tr. 6056–57. Ernst, Tr. 5366.
[1335] Reichel, Tr. 6036.

617

On April 15, 1929, Sylvania, SIDAC, and Compagnie Internationale des Industries Chimiques executed an agree-
1629 ment under which Sylvania got rights to processes and financing to enter cellophane manufacture, and by the terms of which SIDAC agreed not to manufacture or sell cellophane in the United States for a period of 30 years.[1336] DuPont had nothing to do with this contract.[1337]

618

Belgian SIDAC took a substantial share in the stock of Sylvania.[1338] In addition, all of the processes, engineering assistance, technical information and operating knowhow used by Sylvania were supplied to it by Belgian SIDAC.[1339] Ernest Bleibler was sent to Fredericksburg to supervise the planning, building and commencement of manufacture of Sylvania's cellophane plant.[1340] In 1929 the two companies entered into a technical exchange agreement, and technical information, patent rights, and inventions have been exchanged between the two companies ever since.[1341]

619

La Cellophane sued SIDAC in Belgium for theft of the secret processes and the patent infringement,[1342] but terminated the suit in 1930 upon an offer of SIDAC to settle the litigation by turning over to La Cellophane approximately one-third of the shares of SIDAC.[1343] The amount of indemnity was negotiated between the two parties. Some substantial stockholding in SIDAC, the precise amount of which is not clear, was issued to La Cellophane.[1344]

620

When La Cellophane took stock in SIDAC in settlement of the litigation over piracy of the process, it became indi-
1630 rectly interested in Sylvania. This was a breach of the agreement between La Cellophane and duPont of June 9, 1923, which provided in Paragraph 11 La Cellophane should not directly or indirectly engage in the cellophane business in North or Central America except through its interest in the duPont Cellophane Company.[1345] Negotiations ensued between La Cellophane

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[1336] DX 999, 4/15/29.
[1337] Reichel, Tr. 6034.
[1338] Reichel, Tr. 6053–54. DX 999, Art. 6, 4/15/29.
[1339] Reichel, Tr. 6031.
[1340] Reichel, Tr. 6031.
[1341] Reichel, Tr. 6035–36. DX 999, Art. 4, 4/15/29.
[1342] Swint, Tr. 6194. GX 1410, p. 1831, 11/14/29.
[1343] GX 1410, p. 1831, 11/14/29. GX 1067, p. 1012, 10/25/29.
[1344] GX 1410, p. 1831, 11/14/29. GX 1010, p. 1020, 1/14/30.
[1345] Carpenter, Tr. 6272. Swint Tr. 6194–95. GX 1410, p. 1832, 11/14/29.

Company and the duPont Cellophane Company as to means of compensating duPont Cellophane Company for contract breach.[1346] Executives of duPont and the duPont Cellophane Company considered compensation in the form of cash, of stock of SIDAC or Sylvania (if obtainable), or a relaxation of the terms of the license from La Cellophane to grant duPont Cellophane Company a non-exclusive license for additional territories.[1347] The third form of compensation was adopted as the policy of the duPont Cellophane Company and was supported by the executives of duPont, and by both duPont and foreign representatives on the duPont Cellophane Company Board.[1348] Frederick W. Pickard and Wendell R. Swint commenced the negotiations with La Cellophane toward this end in January, 1930.[1349]

621

La Cellophane refused to grant the duPont Cellophane Company the rights it sought to sell world-wide cellophane made with the use of French information, and it was agreed, after meetings with La Cellophane's executives, duPont Cellophane Company would receive rights for South America and Japan.[1350] During these negotiations, La Cellophane was carrying on separate negotiations with certain European manufacturers of cellophane (Kalle, Wolff, SIDAC) in an attempt to reach agreement
1631 between themselves as to territorial rights, prices and technical exchange.[1351] Since La Cellophane at the time of its negotiations with Pickard and Swint had not come to an agreement with these European companies, rights which La Cellophane had power to grant as to non-moistureproof cellophane depended in part upon the outcome of the meetings with Kalle and SIDAC. The duPont Cellophane Company Board, in May 1930, ratified a modified form of La Cellophane's proposal. The ratified agreement, accepted by La Cellophane, provided La Cellophane and duPont Cellophane Company should have equal rights in South America. It deleted La Cellophane's proposals of uniform prices, and of sales dependent in any way upon the outcome of the prospective European Convention.[1352]

622

During negotiations between La Cellophane and Pickard and Swint, these individuals by invitation attended as observers only

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[1346] GX 1410, p. 1832, 11/14/29.
[1347] GX 1010, pp. 1020–22, 1/14/30. Carpenter, Tr. 6272. Yerkes, Tr. 6923–24.
[1348] GX 1014, p. 1030, 3/13/30. GX 1015, p. 1031, 5/8/30.
[1349] Swint, Tr. 6196–6204.
[1350] Swint, Tr. 6196. Carpenter, Tr. 6272. Swint, Tr. 6203. GX 1014, p. 1030, 5/13/30.
[1351] Swint, Tr. 6199–6202.
[1352] GX 1014, p. 1030, 5/13/30. GX 1016, p. 1033, 5/23/30. GX 1017, p. 1032, 6/2/30.

the first day of a two day meeting between European producers.[1353] No commitment or agreement on the part of duPont resulted from this. At conclusion of the meeting (Feb. 11–12, 1930), the second day of which Pickard and Swint did not attend, the Europeans signed a tentative agreement among themselves.[1354] No duPont official signed this document, although it was subsequently sent to duPont for its information by La Cellophane.[1355]

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DuPont did not join any convention, or cartel of European manufacturers.[1356] No such convention was long lived, even among the Europeans.[1357] DuPont did not deal with any convention either directly, or indirectly through any of its individual members.[1358]

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DuPont's refusal to join the European convention was understood by the convention itself. In 1932, this fact was acknowledged in writing by La Cellophane.[1359]

625

From the outset of duPont's cellophane sales in South America and Japan pursuant to its agreement of 1930 with La Cellophane, duPont sold at an independent price, and in quantities limited only by the ability of duPont's salesmen and agents to get business in those markets.[1360] DuPont's price was not the same as prices of European manufacturers. Instead it was higher at the beginning, and lower shortly before World War II.[1361] DuPont observed no quota in quantity of sales in those markets. Even between European manufacturers there was great disparity of price.[1362]

626

Cellophane business in South America was highly competitive. European manufacturers tried to take business from duPont and

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[1353] Swint, Tr. 6199, 6201.
[1354] GX 1414, p. 1841.
[1355] Swint, Tr. 6236–37.
[1356] Yerkes, Tr. 6926. Swint, Tr. 6205–06.
[1357] GX 1427, p. 1878, 11/16/32. GX 1438, p. 1893, 10/16/34.
[1358] Yerkes, Tr. 6927.
[1359] GX 1022, p. 1044, 4/1/32. GX 1476, p. 6038, 12/15/32.
[1360] Swint, Tr. 6223–24. DX 789, p. 1671, 8/17/39. GX 1038, p. 1071, 1/31/35.
[1361] DX 776, p. 1655, 10/28/31. DX 780, p. 1659, 9/26/32. DX 783, p. 1662, 6/10/35. DX 786, p. 1666, 3/15/38.
[1362] Swint, Tr. 6214. GX 1031, p. 1057, 3/10/34. GX 1031-A, p. 1058-A, 3/28/34. DX 790, p. 1673, 11/19/40. DX 778, p. 1657, 7/29/32.

from each other by price concessions.[1363] After World War II, all foreign manufacturers were placed at a disadvantage in
1633 Brazil and Argentina, the two principal markets, because of the initiation of domestic manufacture of cellophane in those two countries.[1364]

627

DuPont was not a party to any agreement to exclude Wolff or SIDAC from selling in the United States. Wolff did sell in North American territories for which duPont had been licensed by La Cellophane, particularly Cuba and Mexico,[1365] and SIDAC was excluded from selling in the United States by the express terms of its agreement with Sylvania.[1366]

628

There are other foreign concerns manufacturing cellophane abroad—many of these companies have been in business since before World War II while some have started since. They include concerns with plants located in the following countries:[1367]

Argentina	France
Belgium	Germany
Brazil	Italy
Canada	Japan
Chile	Spain
Egypt	Sweden
England	Switzerland

1634 629

Competition has existed between duPont and importers of foreign made cellophane.[1368] This competition is illustrated by shifts of customers between various importers and duPont. In some instances, duPont gained business at the expense of importers of foreign film; in other instances, importers of foreign film gained business at the expense of duPont. Foreign importers of foreign

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[1363] Swint, Tr. pp. 6212–13. DX 790, pp. 1673–76, 11/19/40. DX 773, p. 1647, 7/23/29. DX 774, p. 1649, 11/1/30. DX 775, p. 1652, 4/30/31. DX 776, p. 1655, 10/28/34. DX 778, p. 1657, 7/29/32. DX 779, p. 1658, 9/1/32. DX 780, p. 1659, 9/26/32. DX781, p. 1660, 7/11/33. DX 783, p. 1662, 6/10/35. DX 784, p. 1663, 4/3/36. DX 785, p. 1665, 3/22/38. DX 789, p. 1671, 8/17/31. DX 790, p. 1673, 11/19/40. GX 1445, pp. 1919–22, 8/6/38.

[1364] Swint, Tr. 6213.

[1365] GX 1022, p. 1044, 4/1/32. DX 774, p. 1649, 11/1/30. DX 779, p. 1658, 9/1/32.

[1366] DX 989, 4/15/29.

[1367] Swint, Tr. 6213, 6229. Goland, DX 1015, pp. 178–84. DX 592, p. 1130, 1946. DX 593, pp. 1133–34, 1946. DX 594, p. 1149, 1948. DX 595, p. 1152, 1948. DX 596, p. 1171, 1949. DX 856, p. 1800, 8/21/31. DX 857, p. 1801, 1932.

[1368] GX 596, 4/7/50, p. 1169.

film have lost business to duPont because of the poorer quality and higher price of foreign cellophane.[1369]

630

Up to 1929, there were substantial importations of European cellophane in the United States. This foreign film constituted approximately 20% of total U. S. consumption during the period 1924–1929.[1370]

631

From 1924 until 1930 importers of foreign cellophane competed with duPont on a price basis.[1371] DuPont's lowering of its cellophane prices made it difficult to undersell.[1372] Little cellophane was imported from 1930 until 1949 due to increasing importance of moistureproof cellophane, inferior quality of foreign cellophane, and the tariff of 45% ad valorem.[1373] Imports did occur in some quantity in 1949.[1374]

1635 632

During the 1920's importers of foreign cellophane offered a price advantage against duPont cellophane. DuPont fought this competition by emphasizing the following points:

1. Assured source of supply.
2. One price to all users.
3. Uniformity of thickness.
4. Uniformity of strength.
5. Uniformity of packages well wrapped in waxed paper.
6. Insurance of full count.
7. Reduced waste and expert cutting.
8. Full adjustment of defective material.
9. Wrapping instructions by duPont salesmen for economical handling.
10. Research laboratory service to customers.
11. Cooperative advertising.
12. Merchandising service by which duPont salesmen solved customer's problems.[1375]

[1369] GX 431, pp. 5681–84, 4/26/29. GX 432, pp. 5695–99, 7/29. GX 433, pp. 5706–11, 9/29. GX 444, p. 5821, 2/9/37. DX 526, p. 978, 9/18/35. DX 527, p. 979, 10/17/35. DX 528, p. 980, 11/27/35. Martin, Tr. 6429.

[1370] Cook, Tr. 2219.

[1371] GX 431, p. 5686, 4/26/29. Mineus, Tr. 1887–88.

[1372] GX 433, pp. 5702, 5710, 1929.

[1373] Cook, Tr. 2111. Goland, DX 1015, p. 182. Horn, DX 1010, pp. 66–67. DX 504, p. 943, 11/19/24. DX 506, p. 945, 1/27/26. DX 514, p. 959, 5/31/29. DX 525, p. 977, 7/16/35. DX 526, p. 978, 9/18/35.

[1374] GX 6021, p. 8096, 5/5/50. GX 580, p. 7331, 8/8/50.

[1375] GX 6029, pp. 8149–52, 8/9/27.

633

Import duties on cellophane were established by Congress not as result of action by duPont. In the late 1920's, duPont filed with an agency of the Government a manufacturer's protest against an administrative agency's tariff classification of transparent cellulose sheeting as a gelatin compound rather than as a cellulose compound. DuPont's protest was the normal act of a business concern engaged in active competition with importers of foreign products. After refusal by the agency to change the classification, on appeal the U. S. Customs Court in 1929 changed the classification of such sheeting to cellulose compound.
1636 The Tariff Act of 1930 established the duty that remained in force until 1951.[1376]

634

United States tariff on cellophane was reduced as of October 1, 1951, from 45% ad valorem to 22½% ad valorem in 1951 for rolls over 36″ wide, and from 30¢ per pound to 20¢ per pound for rolls under 36″ wide. Average selling price before duty for foreign film had been about 50¢ per pound. Even reduced tariffs raised final quotations of foreign film to users over domestic prices.[1377]

635

Plaintiff conceded imported cellophane cannot be sold in volume in the United States because of its unavailability, its high price and its quality compared to U. S. made film.[1378]

636

Some cellophane of foreign manufacture has been sold in the United States during periods of short supply both before and after World War II. These imports have not been large because of certain obstacles to acceptance of this film:

1. Low quality.[1379]
2. Lack of technical service rendered by the foreign manufacturers to customers.[1380]

[1376] DuPont C. Co. v. U. S., T. C. No. 43232; 55 T. D. 327 (Feb. 20, 1929). DuPont C. Co. v. Birn & Wachenheim, 17 CCPA (Customs) 122, T. D. No. 43454; 55 T. D. 926 (June 12, 1929). Act of 1930. Tariff Act of June 17, 1930, c. 497; 46 Stat. 590; 19 U. S. C. 1001, especially par. 31(c). GX 1046, p. 1089, 7/26/27. GX 4469, p. 6249, 2/28/29. Roache, Tr. 3464.

[1377] DX 1000. GX 6024, p. 8103, 5/51.

[1378] Minicus, Tr. 6982–83.

[1379] Goland, DX 1015, p. 182. Horn, DX 1010, pp. 66–67. DX 504, p. 943, 11/19/24. DX 506, p. 945, 1/27/26. DX 514, p. 959, 5/31/29. DX 525, p. 977, 7/16/35. DX 526, p. 978, 9/18/35.

[1380] Horn, DX 1010, pp. 66–67. Goland, DX 1015, pp. 180–183.

1637 3. Fluctuation in price, depending upon time of shipment.[1381]

4. Slow delivery schedules and unpredictable time of shipment.[1382]

5. High price.[1383]

6. High tariff, increasing the delivered price.[1384]

637

Up to World War II European cellophane producers did not offer price, quality or service that would have satisfied U. S. cellophane customers. Cellophane in Europe was considered a luxury, was high priced, was not generally moistureproof and was not used for packaging low cost products.[1385]

638

Some cellophane manufactured in Japan has been imported into the United States.[1386] Despite its low price only a small volume of Japanese cellophane has been sold in the U. S., due to its brittleness, poor machine running ability and generally low quality.[1387]

639

Foreign cellophane from La Cellophane and BCL was imported to some extent in 1950 when cellophane was in short supply. It was offered at higher prices than domestic cellophane. Foreign producers offered no technical service and in some cases
1638 insisted purchaser must take a considerable proportion of non-moistureproof film in order to get moistureproof cellophane.[1388]

640

As of 1950, price of imported 300 gauge moistureproof cellophane, was 52¢ per pound plus 30¢ duty, or 82¢ per pound, while U. S. film of the same type and grade was priced at 48¢ per pound.[1389] Plaintiff conceded imported cellophane could not be successfully sold in the United States at this price differential during periods of free supply.[1390]

[1381] Goland, DX 1015, pp. 180–83.
[1382] Goland, DX 1015, pp. 180–83.
[1383] Martin, Tr. 6428–29. Jakes, DX 1006, p. 8. Goland, DX 1015, pp. 180–83. McCurry, DX 1016, p. 215.
[1384] Martin, Tr. 6428–29. Goland, DX 1015, pp. 180–83. DX 518, p. 965, 4/10/30. DX 335, p. 641.
[1385] Goland, DX 1015, pp. 177–78, 180.
[1386] GX 26, p. 248, 5/21/46. DX 523, p. 974, 8/24/34.
[1387] DX 526, p. 978, 9/8/35. DX 527, p. 979, 10/7/35.
[1388] Horn, DX 1010, pp. 66–67. Leeds, DX 1011, pp. 99–100. McCurry, DX 1016, p. 215. Goland, DX 1015, pp. 178–79. GX 6021, p. 8096, 5/5/50.
[1389] GX 580, p. 7331, 8/8/50.
[1390] Minieus, Tr. 6981.

641

When U. S. cellophane and foreign cellophane are both available, U. S. users and converters will not purchase foreign cellophane at an equal or even lower delivered price.[1391] This is due to inferior quality of foreign cellophane, lack of technical and sales service, delays in delivery and requirement of foreign producers for payment in advance.[1392] Reduction of duty in 1951 was not significant on the purchase of foreign cellophane due to these other reasons for the preference of U. S. customers for U. S. cellophane.[1393]

642

In 1951 two-thirds of European production was non-moistureproof and the remaining one-third was moistureproof of a single type. European concerns asked high prices, offered no service, and did not analyze the American market or try to improve their product.[1394]

643

DuPont's basic product patent on moistureproof cellophane gave it the right to exclude all imports of moisture-
1639 proof cellophane.[1395] While there is no evidence duPont sought to assert this patent against imports it did not grant licenses to any importer nor did any importer seek a license.[1396]

644

Birn & Wachenheim in 1921 was a distributor of waxed paper, glassine and cellophane. It obtained its cellophane from La Cellophane. It continued selling and promoting use in the United States of cellophane manufactured in France until about 1927, despite the sale in 1923 by La Cellophane of its patents, processes and technology to duPont Cellophane Company. In 1927, Birn & Wachenheim began distributing Belgian cellophane manufactured by SIDAC and continued to do so until Birn & Wachenheim was absorbed by Sylvania in 1929.[1397]

[1391] Leeds, DX 1011, p. 100. Goland, DX 1015, pp. 181–83. Horn, DX 1010, pp. 66–67.
[1392] Goland, DX 1015, pp. 179–83. Horn, DX 1010, pp. 66–67.
[1393] Goland, DX 1015, p. 181.
[1394] Goland, DX 1015, pp. 178–180.
[1395] W. W. Smith, Tr. 6514–15, 3/24/49. Manicus, Tr. 6960–62.
[1396] W. W. Smith, Tr. 6517.
[1397] Reichel, Tr. 6036–37. Hamburg, Tr. 1616–17. DX 515, p. 962, 11/1/29. DX 516, p. 963, 11/1/29. GX 433, p. 5702, Oct. 1929. GX 1066, p. 382, 8/25/23.

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The record establishes imports of cellophane have been small since 1929, because of the quality and higher price of foreign cellophane, the existence of U. S. patents relating to moistureproof cellophane, and because of U. S. tariff.

XIII. DuPont Did Not Attempt and Is Not Attempting to Monopolize

(Findings 646–686)

A. GENERAL

(Findings 646–660)

646

DuPont acted in good faith in development of its cellophane business. It sought to act in ways that would not violate United States law [1398]

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DuPont's purpose in the cellophane business was to make money by enlarging its activities in industry, and it was offered a means by acquiring a secret process for a new product.[1399]

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In the development of its cellophane business, duPont sought to enlarge the market from a narrow one to a broad one. At outset, demand was narrow and price high. By research directed to quality of product and efficiency of manufacture, cost was reduced and quality improved. By this means duPont wanted to get volume sales in the wrapping industry. As costs went down, prices were reduced, markets expanded, so duPont's return on investment was satisfactory. DuPont's motive in taking these steps was to make money and to compete.[1400]

649

DuPont did not seek to attain success in the cellophane business with intent of suppressing or excluding competition.[1401]

[1398] Carpenter, Tr. 6275–83.
[1399] Carpenter, Tr. 6275.
[1400] Yerkes, Tr. 6940–42. Carpenter, Tr. 6275–76, 6278–79. PX 369, pp. 689–91, 1944.
[1401] Carpenter, Tr. 6283. McCune, Tr. 5589–90, 5594–96. Yerkes, Tr. 6949–50.

650

In conduct of its cellophane business, duPont took no step contrary to legal advice. Counsel was consulted by management on all important actions and a suggested course of action was not followed unless advance approval of its legality was obtained.[1402]

651

Foreign shareholders in Sylvania and SIDAC placed
1641 quantities of shares on the market from time to time. DuPont had opportunities to acquire such shares. For legal reasons, and because it thought the investment unwise, duPont declined to acquire any stock in Sylvania or SIDAC.[1403]

DuPont devoted manpower and expense to development of packaging machinery and did not attempt to assert any control over the use or sale of machinery to which its efforts had contributed, although the same machines handle competing cellophane and other flexible wrapping materials. DuPont encouraged end users to employ such machinery for packaging with unprinted cellophane, rather than protecting sales of duPont's converters.[1404] DuPont did not vertically integrate, either forward by engaging in conversion of cellophane, or backward by engaging in manufacture of wood pulp, the principal raw material.[1405] These actions are inconsistent with a monopolistic intent, but are consistent with a purpose to stimulate use of cellophane for volume packaging purposes.

653

DuPont expanded for the business purpose of meeting forecasted short range demand and not with intent to have excess productive capacity.[1406]

654

Glassine manufacturers purchase moistureproof coatings from duPont which enables them to produce an improved packaging material that is sold in competition with cellophane.[1407]

1642 655

When glassine manufacturers sought to use for producing an improvement in their wrapping materials moistureproofing com-

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[1402] See, e. g., GX 1410, p. 1831, 11/15/29. GX 1008, p. 1015, 11/19/29. GX 1231, p. 1537, 2/10/30. Carpenter, Tr. 6283.

[1403] DX 762, p. 1620, 5/21/29. DX 763, p. 1621, 12/13/33. GX 67, p. 210, 1/3/35. DX 764, p. 1622, 5/8/35.

[1404] DXs 410–435.

[1405] DX 483, p. 918, 10/15/40. DX 446, p. 874, 7/23/25. GX 495A, pp. 6702–03, 1/21/43. DX 622, p. 1266.

[1406] DX 605A, p. 1231, 4/23/30. DX 610, p. 1243, 4/19/38.

[1407] Nelson, DX 1020, p. 315. DX 323, p. 616, 10/18/32.

positions on which duPont held patents, duPont did not institute or threaten infringement suits, but instead granted licenses under its patents.[1408]

656

DuPont had an opportunity to purchase certain patents relating to a cellulose base film, of which Union Carbide and Carbon Company was considering the manufacture. DuPont declined to purchase the patents although it recognized Union Carbide and Carbon Company was attempting to get them with a view to competition.[1409]

657

Despite a belief Union Carbide and Carbon Company would enter the manufacture of film, duPont refused to make any deal as to manufacture of the product or the purchase of relevant patents.[1410]

658

During the period 1924–47, duPont granted approximately 340 separate licenses under its patents relating to cellophane and caps and bands.[1411]

659

Plaintiff conceded duPont owns no patents relating to cellophane currently in effect which would foreclose anyone desiring to do so from entering the manufacture and sale of cellophane.[1412]

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660

Plaintiff conceded the cellophane industry today is not under patent control and there are no existing predatory practices.[1413]

B. OLIN LICENSE

(Findings 661–686)

661

DuPont licensed Olin to manufacture cellophane;[1414] assisted it in construction of a plant,[1415] following arm's-length negotiations

[1408] DX 308, p. 592, Dec. 1931. DX 309, p. 594, 12/4/31. DX 310, p. 595, 12/7/31. DX 311, p. 597, 12/4/31. DX 323, p. 616, 10/18/32. GX 403, pp. 696, 697, 698, 699, 5/15/50.
[1409] DX 637, pp. 1295–96, 7/10/33.
[1410] DX 638, p. 1297, 1/16/34. DX 639, p. 1298. DX 640, p. 1299, 11/13/34. DX 641, p. 1300, 11/22/34.
[1411] GX 403, p. 5580–A.
[1412] Minieus, Tr. 2310–11.
[1413] Minieus, Tr. 2313–15.
[1414] DX 974, pp. 1985–2001, 11/4/49.
[1415] Olsen, Tr. 6828.

conducted by duPont[1416] with purpose and intent of establishing another wholly independent and competing cellophane producer.[1417]

662

DuPont had plans for increasing production by construction of a new eight casting machine plant when the complaint was filed in this action. These plans were dropped because duPont management did not believe it was prudent to risk stockholders' capital in a new plant in view of the uncertainties created by plaintiff's efforts in the suit to divest duPont of plant.[1418]

663

DuPont's decision in 1948 to attempt to interest other concerns in manufacture of cellophane was to supply needs of the public. United States capacity was then insufficient to meet demand. DuPont had an obligation to attempt to supply cellophane since it had created demand for the product. Since it was at-
1644 tacked for existing capacity, it sought to meet the demand by encouraging others to engage in manufacture.[1419]

664

DuPont in 1948 offered to license its patents to any qualified company for a fee, and to assist such company to enter manufacture of cellophane. This offer developed:

(a) In May, 1947, duPont Rayon Department initiated an appropriation request to cover the expense of preliminary designs for a new eight casting machine cellophane plant at Clinton, Iowa. The estimated total cost of this expansion was $12,800,000. Reason for expansion was the inability of existing and planned capacity to meet forecasted demand for cellophane. Capacity with existing plant was expected to approximate 176,000,000 lbs. by the middle of 1948, whereas the sales forecast for 1949 was 235,000,000 lbs. This appropriation for preliminary design was approved by the Executive Committee and Finance Committee of duPont.[1420]

(b) The complaint in this action was served December 22, 1947.[1421]

[1416] Olsen, Tr. 6818–27.
[1417] Olsen, Tr. 6820–21. GX 594, p. 7556, 5/27/49. DX 621, p. 1265, 3/17/48.
[1418] DX 620, pp. 1262–64, 5/8/47. DX 621, p. 1265, 3/17/48. GX 582 (Imp. Doc. No. 582), 3/9/48.
[1419] DX 620, pp. 1262–64, 5/8/47. GX 582 (Imp. Doc. No. 18), 3/9/48. DX 621, p. 1265, 3/17/48.
[1420] DX 620, pp. 1262–64, 5/8/47.
[1421] Comparison of Answer & Complaint, p. 60.

(c) On January 12, 1948, Rayon Department made a further appropriation request for $250,000 to cover site studies and design for the proposed new cellophane plant.[1422]

(d) This appropriation request was considered by the Executive Committee on January 21, 1948, and again on March 17, 1948. After discussion with representatives of the Rayon, Development, and Legal Departments, duPont's Executive Committee did not approve the request for appropriation, but directed efforts to be made to interest one or more concerns in going into the
1645 manufacture of cellophane and cellulose bands on the basis of duPont furnishing its commercial practice and licenses under its patents for a moderate fee.[1423]

(e) DuPont made proposals of this nature to various companies. These were Tennessee Eastman Co., associated with Eastman Kodak Co., Air Reduction Co., Freeport Sulphur Co., Visking Corp., Allied Chemical Co., Kalamazoo Vegetable Parchment Co., Phillips Chemical Co., Crown-Zellerbach Co., and Goodyear Tire & Rubber Co.[1424]

(f) Olin was not approached by duPont, but approached duPont, without invitation, in October 1948,[1425] and a license agreement was made in November 1949.[1426] Olin had studied possibility of manufacturing cellophane for many years and had considerable research and market information at its disposal.[1427]

665

The license contract between duPont and Olin includes the entire understanding between the parties[1428] and contains the following provisions, among others:[1429]

(1) Relates to plain and moistureproof cellophane.

(2) Is non-exclusive.

(3) DuPont is obligated to give Olin technical information relating to cellophane manufacture and used by duPont in its cellophane manufacturing operations at the date of the agreement and for four years thereafter.

(4) DuPont is obligated to undertake design and construction of an eight casting machine plant with a design capacity of 33,700,000 lbs.

1646 (5) DuPont is to assist Olin in hiring and training plant personnel and to assist the establishment of engineering, research, sales and administration organizations for the plant,

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[1422] DX 621, p. 1265, 3/17/48.
[1423] DX 621, p. 1265, 3/17/48.
[1424] GX 594, Book 43, pp. 7545–46, 12/14/49.
[1425] Olsen, Tr. 6818, 6840. DX 973, pp. 1983–84, 10/25/48
[1426] Olsen, Tr. 6819–24, 6839–40. DX 974, pp. 1985–2001, 11/4/49. GX 595, pp. 7559–60, 7562, 5/27/49., GX 597, p. 7566, 1/31/49.
[1427] Olsen, Tr. 6838–39.
[1428] Olsen, Tr. 6827.
[1429] DX 974, pp. 1985–2001, 11/4/49.

obligation as to training of personnel to terminate six months after initial plant operations.

(6) duPont is obligated for five years after the agreement upon request by Olin to undertake design and similar construction with respect to an additional plant of the same capacity as the first.

(7) Olin is entitled to unrestricted use and disposition of technical information received from duPont, but is required to keep it confidential for ten years.

(8) Olin is granted non-exclusive licenses to manufacture, use and sell cellophane under every patent owned by duPont and issued on any application filed prior to six years after date of the agreement.

(9) DuPont is to receive $400,000 for the information and know-how given Olin, $100,000 for the patent licenses and $500,000 for work done with respect to design and construction of the first plant.

(10) Olin is free without payment to duPont to build plant capacity to any extent it desires in addition to that provided for in the agreement.

(11) DuPont has no reciprocal rights to obtain technical information from Olin.

666

DuPont's performance under the duPont-Olin contract has been satisfactory to Olin.[1430]

667

DuPont has no agreement or financial relationship with Olin Industries by which duPont is in position to influence Olin's competition in manufacture or sale of cellophane.[1431]

1647

668

No agreement or understanding of any kind exists between duPont and Olin relating to cellophane other than contained in the contract of November 4, 1949, as amended.[1432]

669

DuPont owns no stock in Olin.[1433]

[1430] Olsen, Tr. 6828.
[1431] Olsen, Tr. 6827, 6833-34
[1432] Olsen, Tr. 6827.
[1433] Olsen, Tr. 6833.

670

In 1896 duPont acquired 29% of the equity in Equitable Powder Co., one of Olin's many subsidiaries, and increased its interest to 49% in 1905. DuPont still owns 49% of Equitable stock. Throughout this minority ownership by duPont, Olin interests have owned or controlled 51% of Equitable and managed and operated the company.[1434]

671

Equitable is a manufacturer of black powder.[1435] It also owns 85% of the stock of Egyptian Powder Company, a manufacturer of black powder, and 100% of Columbia Powder Company, a manufacturer of dynamite.[1436] Equitable has an asset value somewhat in excess of $6,000,000.[1437]

672

DuPont has no representation on the Board of Directors of Equitable since 1918.[1438]

673

No assets or credit of Equitable were used by Olin in Olin's cellophane operations.[1439]

1648

674

DuPont never had any participation in management or operation of Equitable.[1440] DuPont's stock interest in Equitable and its inability to participate in management has been a cause of friction between duPont and Olin.[1441] Olin's policy was to maintain a large surplus in Equitable.[1442] DuPont on occasions sought to have this surplus distributed to the stockholders. Olin refused to comply with duPont's wishes.[1443] Olin used portions of surplus for investment in other enterprises in which Olin had interest. DuPont protested against this.[1444]

675

On occasions duPont sought to eliminate joint ownership of Equitable by liquidation of Equitable, purchase by Olin of

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[1434] GX 605, p. 7601. GX 599, p. 7587, 10/12/42. GX 611, p. 7614, 5/1/24. Olsen, Tr. 6820, 6845–46, 6848–49, 6858–59. Carpenter, Tr. 6314, 6320.
[1435] Carpenter, Tr. 6311. Olsen, Tr. 6849.
[1436] GX 602, p. 7596, 7/5/51. Olsen, Tr. 6848.
[1437] Olsen, Tr. 6846. GX 602, p. 7597, 7/5/51.
[1438] Minieus, Tr. 7146. Olsen, Tr. 6820. GX-606, p. 7605, 5/2/22. GX 609, p. 7611, 1930. GX 616, p. 7624, 5/20/29. DX 1024, 4/18/31. Carpenter, Tr. 6314.
[1439] Olsen, Tr. 6829. DX 1025, 10/28/49.
[1440] Carpenter, Tr. 6314, 6320. Olsen, Tr. 6820.
[1441] E. g. GX 606, pp. 7605–07, 5/2/22. Olsen, Tr. 6818–19.
[1442] GX 606, pp. 7605–07, 5/2/22. GX 600, pp. 7590–92, 12/4/42. GX 602, p. 7597, 12/31/50.
[1443] GX 614, pp. 7620–21, 11/10/27. GX 606, pp. 7605–07, 5/2/22.
[1444] GX 606, p. 7606, 5/2/22.

duPont's interest, or purchase by duPont of Olin's interest. Attempts have been unsuccessful.[1443]

676

No proof was shown of any relationship between duPont and Olin arising out of Equitable since 1933, except for routine payments of dividends on duPont's Equitable stock and duPont's attempts to eliminate joint ownership of Olin.[1446]

677

No charge or proof was shown of relationship between du Pont and Olin violative of the Sherman Act.[1447] In fact,
1649 the two concerns, have been vigorous and unfriendly competitors in powder, ammunition and guns.[1448]

678

Olin Industries, Inc. is a concern with sufficient resources and experience to compete with duPont and Sylvania in the manufacture and sale of cellophane.[1449]

679

Olin manufactures guns, ammunition, sheet brass, smokeless powder, high explosives, flashlight batteries, cigarette and fine papers, cellophane and polyethylene sheeting.[1450] It also owns timber interests.[1451] Olin's assets as of 12/31/51 were approximately 180 million dollars and its annual gross sales about 170 million.[1452]

680

Olin's cellophane plant at Pisgah Forest, North Carolina, began production of cellophane on June 11, 1951.[1453] The plant was financed largely by a loan from Prudential Insurance Company.[1454] Olin's investment exceeded $15,000,000 for the cellophane plant, plus some portion of another $25,000,000 spent for a cigarette paper plant on the same site, with which the cellophane plant shares some facilities.[1455]

[1445] GX 605, pp. 7602–03, 3/9/49. DX 1022, 1/1/32. DX 1028, 1/7/32. GX 599, p. 7587, 10/12/42. GX 601, p. 7594, 1/29/45.
[1446] GX 605, pp. 7602–03, 3/9/49. GX 603, p. 7599, 12/26/50. DX 1028, 2/23/49.
[1447] Minicus, Tr. 7135–36, 7189–90.
[1448] Olsen, Tr. 6808, 6818–19, 6833–34.
[1449] Olsen, Tr. 6808–10.
[1450] Olsen, Tr. 6809.
[1451] Olsen, Tr. 6834.
[1452] Olsen, Tr. 6810.
[1453] Olsen, Tr. 6829. DX 978, p. 2008.
[1454] Olsen, Tr. 6829.
[1455] Olsen, Tr. 6829–30.

681

Olin's cellophane plant has a capacity of 34,000,000 lbs. Its construction is efficient, producing cellophane of equal quality to duPont's.[1456]

1650 682

Olin plans to build an additional plant. Olin's second plant is planned to have 10 machines with possibility of expanding it to 20 machines if business warrants.[1457]

683

Olin plans to integrate its timber production with its cellophane manufacturing activities so to be its own supplier of raw pulp.[1458]

684

Olin has built up a strong research organization for its cellophane operation.[1459] For years it conducted extensive cellulose research in an effort to develop various films and to improve products made by it. This work has aided it in its cellophane activities.[1460]

685

Olin is selling cellophane to the trade at a profit. It has been able to secure adequate converter and distribution outlets and to take customers from both duPont and Sylvania.[1461]

686

On the basis of exhibits introduced by both parties and testimony of witnesses, it is established past relations between duPont and Olin have been unfriendly rather than cooperative. Ownership by each company of stock in Equitable Powder Company aggravated hostility. Olin has ability and intent to compete as an independent cellophane producer. Uncontradicted evidence establishes licensing of Olin was a bone fide transaction. Olin has made a large investment in cellophane production, and it will compete aggressively.

[1456] DX 974, p. 1990, 10/28/49. DX 596, p. 1169, 4/7/50. DX 978, p. 2008, 6/11/51. Olsen, Tr. 6830–33. McCurry, DX 1016, p. 216.
[1457] Olsen, Tr. 6832–33.
[1458] Olsen, Tr. 6834.
[1459] Olsen, Tr. 6831.
[1460] Olsen, Tr. 6811, 6815–18, 6834–35, 6837–39.
[1461] Olsen, Tr. 6830–33.

1651 XIV. DuPont Has Not Monopolized

(Findings 687–732)

687

Waxed paper, glassine, and sulphite paper were dominant flexible packaging materials in 1924 and are today.[1462]

688

Other flexible packaging materials such as polyethylene, Pliofilm, cellulose acetate and Saran are increasing in volume of use, both in quantity and in proportions of the total wrapping materials production. This growth is so recent the relatively small quantity of these materials produced up to 1948, or even at the time testimony was taken, is not a reliable index of their future importance.[1463]

689

DuPont's percentage of cellophane production is declining. In May, 1952, Sylvania's annual productive capacity was 72,000,000 lbs.,[1464] Olin's was 34,000,000 lbs.,[1465] and duPont's was 218,000,000 lbs.[1466] Thus, duPont's productive capacity had dropped proportionately to 68% of total U. S. cellophane capacity. Olin has plans to double its capacity in the future,[1467] and Sylvania plans to expand capacity to 1,000,000 lbs.[1468]

690

DuPont has been unable to achieve as much as 20% of production of flexible packaging materials.[1469]

1652 691

There are other producers of cellophane who can supply if duPont is unable to supply or duPont were to seek to create a shortage of cellophane.[1470]

[1462] DX 981. Ramsey, DX 1017, pp. 226, 233. Nelson, DX 1020, p. 301.
[1463] DX 982. Leeds, DX 1011, p. 92.
[1464] Reichel, Tr. p. 6063.
[1465] Olsen, Tr. 6830. DX 974, p. 1990; 10/28/49.
[1466] McCune, Tr. 5548.
[1467] Olsen, Tr. 6832–33.
[1468] GX 410, p. 5602, 2/1/50.
[1469] DX 981.
[1470] Olsen, Tr. pp. 6830–33. Reichel, Tr. 6063. GX 410, Book 33, p. 5602, 2/1/50. DX 596, p. 1168. GX 583, p. 26, 5/16/49.

692

Purchasers of cellophane purchase other flexible packaging materials interchangeably for same purpose as they use cellophane in event cellophane is not supplied by duPont. Such materials are as low or lower in cost and perform the same functions in packaging as cellophane.[1471]

693

The record establishes due to competitive circumstances duPont cannot determine the amount of cellophane that can be made and sold at any given time.

694

During the years from 1924 to 1929 duPont had a single plant which was increased in size from two casting machines to eight.[1472] Demand accelerated with acceptance of moistureproof cellophane after its commercial introduction in 1927.[1473] To meet demand duPont in the period 1929–1932 constructed four plants each having eight machines, or a total increase of thirty-two casting machines.[1474] During this period demand increased more rapidly than capacity.[1475]

The depression reduced demand for duPont cellophane to such extent duPont's capacity exceeded its ability to sell.[1476] Some of duPont's productive facilities were shut down during the period from May, 1932, to March, 1936.[1477]

1653 In 1937 duPont planned to build a new eight machine plant in Clinton, Iowa, but the project was postponed when forecasts of sales indicated additional capacity was not required.[1478] In 1939 Clinton project was reinstated and culminated in Clinton #1, which went into production in March 1941.[1479] Demand for duPont cellophane exceeded its productive capacity from about 1939 until late 1941.[1480]

From December, 1941, until 1942, duPont's productive capacity exceeded demand.[1481] By May, 1942, twenty of duPont's fifty-six casting machines were idle, due to raw materials shortages and lack of demand brought about by wartime controls.[1482] DuPont then closed down Buffalo #1, the oldest plant.[1483] This plant was

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[1471] See findings, supra.
[1472] GX 394, p. 5482.
[1473] GX 395, p. 5488. GX 432, p. 5700, 1929. GX 435, p. 5728, 7/21/30.
[1474] GX 394, p. 5482. DX 602, pp. 1218–19, 9/13/28.
[1475] GX 455, pp. 5889–90, 4/21/30. DX 605A, p. 1231A, 4/23/30.
[1476] GX 394, p. 5481. GX 395, p. 5488. DX 352, p. 667, 12/23/32.
[1477] GX 394, p. 5482.
[1478] DX 610, p. 1243, 4/19/38.
[1479] GX 421, pp. 5646–47, 5/8/39. GX 32, p. 154, 8/23/44.
[1480] DX 555, p. 1065, 10/10/41. GX 32, pp. 153–54, 8/23/44.
[1481] GX 32, pp. 153–4, 8/23/44.
[1482] GX 32, p. 154, 8/23/44.
[1483] GX 394, p. 5482. GX 32, p. 155, 8/23/44.

later converted to the production of rayon tire yarn at the request of plaintiff.[1484] From September, 1942, to early 1949, duPont's productive capacity was not sufficient to meet demand for duPont cellophane.[1485] During war years production was limited by Governmental restrictions on necessary raw materials,[1486] and the amount available for civilian consumption was limited by extensive war use of cellophane.[1487] From 1945 to March 1949, pent-up demand for duPont cellophane that had been restricted during the war exceeded duPont's productive capacity,[1488] despite an increase in production by duPont from 96,000,000 lbs. in 1945 to 179,000,000 in 1949.[1489] Both increased demand and production were in moistureproof cellophane.[1490] DuPont's plain
1654 cellophane production was lower in 1949 than in 1939, 1940 or 1941.[1491]

For six months commencing March, 1949, duPont's productive capacity exceeded its ability to sell its output.[1492]

From late 1949 to early 1952, demand for duPont cellophane again exceeded duPont's capacity to produce, despite increases in such capacity.[1493]

Commencing in 1952 and continuing to the closing of the record, duPont's ability to produce again exceeded its ability to sell duPont cellophane.[1494]

695

Aware Sylvania and Olin planned expansion of cellophane capacity to 100,000,000 lbs. and 67,000,000 lbs.[1495] duPont in 1949 and 1950 conducted research to determine what investment and what technological improvements would be necessary if duPont was to expand cellophane production.[1496] The final report on this research project was submitted in April, 1950. It considered neither construction of new plants nor addition of more casting machines.[1497] It outlined possibilities for increasing productivity through an improved manufacturing process and other technological improvements that were in the blueprint stage.[1498]

[1484] Hanson, DX 1018. Yerkes, Tr. 6950. GX 394, p. 5482. GX 32, pp. 153–61, 8/23/44.
[1485] R. R. Smith, Tr. 6003. GX 84, p. 321, 3/1/43. DX 372, 374. GX 497, 498, 85–88.
[1486] GX 88, p. 339, 3/10/47. GX 495A, pp. 6702–03.
[1487] GX 85, p. 327, 2/28/44. GX 86, pp. 331–332, 3/1/45. GX 87, p. 336, 3/11/46. GX 497, p. 6800, 1/15/44.
[1488] GX 87, p. 336, 3/11/46. GX 88, p. 339, 3/10/47. GX 570 (Imp. Doc. No. 1, 1/26/48. DX 374, p. 703, 1/26/48. DX 596, p. 1167, 4/7/50.
[1489] GX 393, p. 5476.
[1490] GX 395, p. 5488. GX 393, p. 5476.
[1491] GX 393, p. 5476.
[1492] R. R. Smith, Tr. 6003. DX 596, p. 1167, 4/7/50.
[1493] R. R. Smith, Tr. 6003. GX 572 (Imp. Doc. 9), 1/20/50. GX 573 (Imp. Doc. 13), 1/26/51. GX 574 (Imp. Doc. 14), 8/24/51.
[1494] R. R. Smith, Tr. 5761, 5845, 5980.
[1495] GX 587 (Imp. Doc. No. 46), p. 5, 4/28/50.
[1496] Ibid., pp. 1–75.
[1497] Ibid., pp. 5, 28, 38, 50, 59.
[1498] Ibid., pp. 22, 68.

The report was premised on these factors:

(1) Cellophane demand would continue to exceed available supply.

(2) If cellophane demand did continue to rise, duPont management could authorize expansion of capacity to help meet this demand, and

1655 (3) If such expansion were authorized, necessary technological improvements could be reduced to commercial practice to make increased production actuality.[1499]

After filing of this report, future prospects for cellophane changed. Dupont's net return on its Film Department investment for the first seven months of 1951 fell 50% below the preceding year,[1500] and cellophane has been a glut on the market since the beginning of 1952.[1501] There is no proof duPont management authorized expenditures for increased cellophane capacity after filing of this report. There is no proof duPont research and engineering personnel achieved revolutionary technological improvements outlined in the report.

696

The record establishes domestic buyers of cellophane do not lack alternative sources of supply, and duPont does not have power to restrain free competition at the distribution level of the industry.

697

Free competition exists and has existed at distribution level of the flexible packaging materials markets. DuPont has no power to prevent or restrain that competition.[1502]

698

No proof was shown duPont's methods of distribution were adopted for the purpose of obtaining monopoly powers or such methods tended to create such powers.

699

Facts do not support plaintiff's contention when duPont
1656 cellophane displaces another flexible wrapping material, or when another material displaces duPont cellophane, then the two alternative materials are not in competition with one another. There is rivalry, on basis of quality, service and price,

[1499] Ibid., pp. 1–75.
[1500] GX 574 (Imp. Doc. No. 11), 8/24/51.
[1501] R. R. Smith, Tr. 5761, 5845. Martin, Tr. 6459.
[1502] R. R. Smith, Tr. 5881. Martin, Tr. 6371–74.

between cellophane and other packaging materials in various end uses, and frequent shifting of buyers back and forth. In this competition, cellophane or its rivals might, at any given moment, be winner of the business of a particular customer or customers.

700

Facts do not support plaintiff's contention a customer is an element in the cellophane market only as long as he is using cellophane. The price, quality, and supply of cellophane have in fact been directed at non-users of cellophane. Changes in price, quality, and supply have had the effect of diverting some of them to cellophane. Manufacturers of competing materials have exerted same efforts toward users of cellophane. All wound-be sellers have tried to capture non-users.

701

The record does not support plaintiff's contention a customer is an element in the cellophane market only so long as he is actually using cellophane. Purchasers of materials other than cellophane are active in making laboratory tests and inquiries as to possibility of using cellophane at a better price or of a quality better tailored to their needs; while purchasers of cellophane are active in ascertaining feasibility of more advantageous use of materials other than cellophane.[1503]

702

Sales of cellophane by producers are made not to household consumers but to business concerns. Price each buyer is willing to pay depends on profit gained or loss avoided by using cello-
1657 phane, as compared with profitability of using other flexible wraps. Customers make close calculations of advantage of the competing wrapping materials for each specific end use.[1504]

703

No account is supplied with flexible packaging materials for longer than a few months at a time. Inventory periods are short, turnover is constant, products themselves, i. e., flexible packaging materials, are consumed soon after incorporated in a package. Packages employing flexible materials have short lives, and are always destroyed at the time of the use of the product in the package.

[1503] E. g.: Southwick, DX 1008, pp. 25, 32. Horn, DX 1010, pp. 68, 69. McCurry, DX 1016, pp. 211, 212, 221. R. R. Smith, Tr. 5843–44.

[1504] E. g.: Jakes, DX 1006, pp. 8, 10, 13. Horn, DX 1010, pp. 65, 68–69. McCurry, DX 1016, p. 210. Elmstrom, DX 1013, pp. 279–280.

Every account is back on the market with further packaging requirements every few weeks or months. Sources of supply are constantly shifting.[1505]

704

There is no proof duPont's policy of developing converter business and rendering service to converters tended to give it monopoly power.

705

DuPont's converters are not dependent on it for supply. Shellmar, largest of general line converters, converts cellophane, Pliofilm, Saran, polyethylene, cellulose acetate, aluminum foil, glassine, sulphite, kraft paper, greaseproof paper, vegetable parchment and tissue. Shellmar sells wraps of different material to every trade.[1506]

706

Milprint, another general line converter, converts glassine, cellophane, sulphite, greaseproof paper, vegetable parchment, waxed paper, cellulose acetate, Pliofilm, polyethylene, Saran and aluminum foil. Among uses for which Milprint converts are:[1507]

1658

Uses	*Materials*
Potato chips	Cellophane.
	Aluminum foil.
	Pliofilm.
	Glassine.
Butter	Aluminum foil.
	Vegetable parchment.
	Waxed paper.
Oleomargarine	Vegetable parchment.
	Aluminum foil.
	Waged paper.
Candy	Cellophane.
	Glassine.
	Aluminum foil.
	Pliofilm.
	Polyethylene.
Baked goods	Cellophane.
	Cellophane-waxed paper combination.
Cheese	Aluminum foil.
	Rubber-wax coated cellophanes.
	Pliofilm.
Frozen foods	Aluminum foil.
	Cellophane.
	Waxed paper.
Bacon	Cellophane.
	Greaseproof paper.
	Vegetable parchment.
	Waxed paper.
	Glassine.

[1505] Leinbach, Tr. 6805–06. Martin, Tr. 6355–58. Russell, Tr. 6471–72.
[1506] Martin, Tr. 6334.
[1507] Hanson, DX 1018, pp. 248–51.

707

Nashua Gummed and Coated Paper Company converts waxed paper, waxed glassine, cellophane, Pliofilm, polyethylene, 1659 cellulose acetate and other converted paper products. The uses to which its wrappers are put into varieties of materials supplied to each trade by Nashua are listed:

Use	*Material sold*
Bread	Wax papper, cellophane, glassine.
Crackers, cookies and biscuits.	Paraffin wax paper, cellophane, glassine.
Candy	Wax papper, cellophane, glassine.
Chewing gum	Wax paper, cellophane, glassine.
Frozen foods	Wax paper, cellophane, Pliofilm.
Potato chips, popcorn, snacks	Glassine, cellophane.
Fresh produce	Pliofilm, cellophane, polyethylene.
Nut meat	Cellophane, glassine.
Dairy products	Wax paper, cellophane.
Tobacco products	Cellophane, wax paper, glassine.
Textiles and hose	Polyethylene, Pliofilm, cellophane, glassine.
Razor blades	Wax papepr, cellophane.
Sugar	Wax paper, coated sulphite.

Converting of transparent films accounts for only 10% of Nashua's annual sales.[1508]

708

Marathon Corporation is largest converter in the country 1660 of opaque rubber-paraffin coated cellophane cheese wraps for the direct wrapping of processed cheese, and one of the largest converters of waxed paper. Converted waxed paper wraps are supplied by Marathon to frozen food packing trade, dairy trade, baking industry and meat packing industry. Marathon Corporation also converts small quantities of aluminum foil.[1509]

709

Manufacturers of packaging machinery design machines for facility of conversion between a number of flexible packaging materials including cellophane. This enhances salability of machinery and makes it possible for users of machinery (a) to shift their packaging business between cellophane and other materials and (b) to operate when such shifts are made.[1510]

710

Cellophane prices have not been arbitrary and noncompetitive.[1511]

[1508] Ramsey, DX 1017, pp. 225–28.
[1509] Crdy, DX 1021, pp. 333–34, 339–40.
[1510] Tindal, DX 1012, pp. 105–06. Leinbach, Tr. 6746. Russell, Tr. 6464–69.
[1511] Yerkes, Tr. 6941–42.

711

When duPont considered a price increase in 1948 it took into account the effect of a price increase upon duPont's ability to sell its output, the effect upon duPont's return on investment, and the relationship between proposed increased prices and prices of waxed paper, glassine and other packaging materials. This incident was offered by plaintiff as its strongest evidence of duPont's power to set arbitrary non-competitive prices. The incident negatives the existence of such powers.[1512]

712

Dupont has no power to set cellophane prices arbitrarily.
1661 If prices for cellophane increase in relation to prices of other flexible packaging materials it will lose business to manufacturers of such materials in varying amounts for each of duPont cellophane's major end uses. Relative increases would make competition more difficult to obtain new business.[1513]

713

Improvement in relative composite properties of cellophane increases its value and enables cellophane to gain business from other materials.[1514]

714

DuPont has made profits. Net return on cellophane during the period of 1937–1949 has varied between a high of 28.7% in 1939 and a low of 8.4% in 1942.[1515]

715

DuPont charged prices for cellophane that would yield a return on investment, but was never able to determine in advance what rate of profit it would achieve.[1516]

716

Whether it should increase cellophane prices, duPont, in May, 1948, took into account the question of whether its capacity output

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[1512] Minicus, Tr. 7063. GX 591, p. 7538, 5/27/48. DX 375, p. 704. DX 377, p. 707, 6/2/48. DX 378, p. 708. DX 379, p. 709.

[1513] R. R. Smith, Tr. 5841–42. Yerkes, Tr. 6940–47. Jakes, DX 1006, pp. 10–11. Horn, DX 1010, pp. 69–70. McCurry, DX 1016, pp. 210–11. Nelson, DX 1020, p. 318.

[1514] Jakes, DX 1006, pp. 10, 13. Horn, DX 1010, pp. 65,68–70. McCurry, DX 1016, p. 210. Elmstrom, DX 1019, p. 279. Nelson, DX 1020, p. 318.

[1515] GX 572 (Imp. Doc. No. 9), 1/20/50. GX 591 (Imp. Doc. No. —), 5/27/48.

[1516] Yerkes, Tr. 6943–44. Compare GX 351, p. 874, 12/16/36 (estimate) with GX 591 (Imp. Doc. No. —), 5/27/48 (actual). Compare GX 355, p. 888, 8/30/38 (estimate) with GX 591 (Imp Doc. No. —), 5/27/48 (actual). DX 372, p. 695, 6/27/47. GX 572 (Imp. Doc. No. 9), 1/20/50. GX 573 (Imp. Doc. No. 13), 1/26/51.

could be sold. DuPont District Sales Managers were divided as to whether this could be done during the remainder of 1948,[1517] although at the time Sylvania's prices for major types of moisture-proof cellophane were four to five cents higher per pound
1662 than duPont's prices.[1518] DuPont did raise its prices on August 1, 1948.[1519] New prices were still one to four cents per pound below Sylvania's prices on major types of moistureproof cellophane.[1520] DuPont's price increase was less than the increased cost of duPont's material and labor since its preceding price increase, and price advances on duPont's cellophane from before World War II to August 1, 1948, were less than those of wax paper and glassine.[1521] Despite further increase in cost of manufacture of one cent per pound, duPont in July, 1950, decided not to increase its cellophane prices, but to review the situation later for possible action effective October 1. The Korean War, commencing late in June, 1950, had effect in forcing costs upward. On September 1, 1950, Sylvania, which in May, 1949, had lowered its prices to meet those of duPont, raised its prices on the major types of cellophane to four cents per pound above duPont prices.[1522] On October 1, 1950, duPont raised prices to equal Sylvania on moistureproof cellophane but to a level still one cent below Sylvania prices on moistureproof heat-sealing cellophane.[1523] Continued impact of rising costs on prices is evident from the fact within three months, on December 15, 1950, Sylvania again raised its prices from four cents to five cents higher per pound than duPont.[1524] Despite price increases on cellophane, net return of the duPont Film Department during the first seven months of 1951 was less than half that of its net return during 1949–50.[1525]

717

DuPont's rate of return on its cellophane investment did not vary with volume of its sales. Volume of dollar
1663 sales increased from 29.3 million dollars in 1939 to 55.3 million dollars in 1947, but operating return and net return on investment were lower in the latter year.[1526] DuPont's dollar sales of cellophane in 1947 were 31% higher than in 1946, but operative earnings were 21% less than in 1946.[1527]

[1517] GX 591, p. 7539, 5/27/48.
[1518] GX 591, p. 1128.
[1519] DX 377, p. 707, 6/22/48.
[1520] DX 591, p. 1128.
[1521] DX 375, p. 704, 6/22/48.
[1522] DX 591, p. 1128.
[1523] DX 591, p. 1128.
[1524] DX 591, p. 1128.
[1525] Compare GX 534 (Imp. Doc. No. 14), 8/24/51 with GX 573 (Imp. Doc. No. 13), 1/26/51.
[1526] GX 395, p. 5488. GX 483, 487, 488, 490. GX 591 (Imp. Doc. No. —), 5/27/48. GX 571 (Imp. Doc. No. 22), 2/3/49. GX 572 (Imp. Doc. No. 9), 1/20/50. GX 573 (Imp. Doc. No. 13), 1/26/51.
[1527] GX 501, p. 6895, 1/27/48.

718

No proof was shown rate of return made by duPont on its cellophane investment was greater than the return earned by Sylvania on its cellophane investment. Evidence shows Sylvania's return as a percentage of sales of all its products (which included artificial horsehair, textile sizing, millinery straw, and bands, as well as cellophane) was lower than duPont's rate of return on its cellophane investment.[1528] There has been no segregation of what percentage of Sylvania's sales resulted from other products.[1529]

719

No proof was shown duPont's rate of return on its cellophane investment has been greater or less than the rate of return made by other producers of flexible packaging materials.

720

DuPont's ability to earn a return on its cellophane investment was assisted by increases in efficiency.[1530] DuPont's annual permanent investment per pound of production of cellophane was reduced from $1.76 in 1925 to 61¢ in 1928, 52¢ in 1934, 37¢ in 1939, and 33¢ in 1944. These reductions resulted from chemical
1664 and mechanical improvements in manufacturing process, not from existence or exercise of monopoly power.[1531]

721

DuPont does not have power to fix and maintain arbitrary and non-competitive terms of sale. Terms at which duPont cellophane is sold must meet customs and requirements of the flexible packaging trade.

722

There is no proof any particular customer is obliged to purchase duPont cellophane in order to package its products.

723

DuPont's terms of sale have not been arbitrary.[1532]

[1528] Reichel, Tr. 6079–80. DX 1026.
[1529] Reichel, Tr. 6097–98.
[1530] Carpenter, Tr. 6275–76. DX 369, pp. 689–91, 1944.
[1531] GX 483, p. 6410, 1/21/29. DX 369, pp. 689–91, 1944
[1532] Yerkes, Tr. 6941–42. DX 407, p. 789, 4/1/49.

724

There is no proof duPont treated any customer for cellophane arbitrarily. Plaintiff conceded it had no complaint from any customer. No customer testified to arbitrary treatment at trial.[1533]

725

DuPont's large customers are demanding in their standards for performance of a flexible packaging material, and maintain laboratory facilities for keeping a constant check on performance of materials they purchase. These customers include General Foods, cigarette companies, Kraft Foods, National Biscuit, Kroger, and others. Neither duPont nor other suppliers of flexible packaging materials can afford to let quality deteriorate or service lag.[1534]

726

Every packaging problem requiring one or more physical properties in a packaging material may be satisfied by
1665 one or a number of flexible packaging materials, including cellophane, or by laminations and combinations of these materials. Few packaging applications are satisfied by a single material. Range of available properties and prices gives users of wrapping materials a choice of solutions to their technical and price requirements.[1535]

727

The record establishes duPont does not have power to exclude others who would engage in the manufacture and sale of cellophane.

728

No evidence was shown anyone desired to manufacture cellophane and was unable because of any act done by duPont.

729

No proof was shown duPont has economic power to prevent others from manufacturing cellophane.

[1533] Minicus, Tr. 11.

[1534] R. R. Smith, Tr. 5842–44. Horn, DX 1010, pp. 67–69. Wilcox, DX 1013, pp. 127–28. McCurry, DX 1016, pp. 211–12.

[1535] Southwick, DX 1008, p. 31. Horn DX 1010, pp. 75–76. Ramsay, DX 1017, pp. 230–242, 244. Hanson, DX 1018, pp. 248–254.

730

No proof was shown duPont sought to exclude others from manufacturing cellophane.[1536]

731

No proof was shown duPont has power to subvert the use and to engross cellophane patents, trademarks, trade secrets or "know-how".

732

Cellophane patents under which duPont has right to grant licenses are listed on the United States Patent Register as available for license and have been licensed to Olin Industries. Some have been licensed to others. In no instance has a license been refused.[1537]

1666 CAPS AND BANDS

(Findings 733–819)

733

Caps and bands are made of regenerated cellulose.[1538] They are extruded so as to form types of coverings which, when placed around the openings of containers or tubing, while in the wet state, shrink upon drying to form a closure.

Caps and bands are shipped in a wet rather than a dry state.[1539]

734

Caps and bands are used as secondary bottle closures and are different products from plain and moistureproof cellophane.[1540] Plaintiff charges two monopolies, a monopoly of plain and moistureproof cellophane and a monopoly of caps and bands.[1541]

735

DuPont began commercial manufacture of caps and bands in 1929.[1542]

[1536] Olsen, Tr. 6829–30, 6863, 6872. Reichel, Tr. 6046–49. Pickens, Tr. 6153. DX 978. DX 542, p. 1001, 9/14/34. GX 574, 8/24/51.
[1537] W. W. Smith, Tr. 6517.
[1538] Answer, Par. 14.
[1539] DX 863, p. 1812, 11/29/33. DX 955, p. 1954, 3/2/38. GX 999, p. 14, 10/41.
[1540] Cook, Tr. 2202–03. Feagley, Tr. 6159.
[1541] Complaint, Par. 22.
[1542] GX 393, p. 5477, 5/15/50.

Although it withdrew from the manufacture of caps in May, 1947,[1543] duPont continues to manufacture bands today.[1544] Since 1941 duPont has had only two band casting machines both located at its Buffalo plant.[1545]

736

As stated, duPont commenced commercial manufacture of caps and bands in 1929[1546] following purchase on December 27,
1667 1928 of Capes-Viscose, Inc., a New Jersey corporation,[1547] which had been a subsidiary of the Comptoir.[1548] Total purchase price was $192,529.66, which included value of assets and certain interest payments.[1549] Acquisition of Capes-Viscose, Inc., resulted in the establishment by duPont Cellophane Company of the Cellulose Cap Division.[1550]

737

Sylvania has been a domestic producer of bands since 1934.[1551] It produced caps from 1933 to 1937 at which time it discontinued its caps business.[1552]

738

Celon Company of Madison, Wisconsin, produces caps and bands.[1553] It produced caps since 1927 and bands from 1934.[1554]

739

Societe de La Viscose Francaise, Societe Anonyme (referred to hereafter as "Viscose Francaise"), is a corporation of France with principal place of business at Paris, France. Viscose Francaise was associated with Comptoir. It was successor in interest to the caps and bands business of Societe Francaise des Crins Artificiels.[1555]

[1543] GX 500, p. 6891, 1/14/47. DX 943, p. 1928, 2/8/49. GX 393, p. 5477.
[1544] Answer, Par. 19.
[1545] GX 394, p. 5487, 5/15/50.
[1546] GX 393, p. 5477.
[1547] GX 1206, p. 1452, 12/27/28. GX 1207, p. 1455, 12/27/28. GX 1208, p. 1463, 5/24/28.
[1548] Answer, Par. 16.
[1549] GX 1206, 12/27/28.
[1550] GX 483, p. 6413, 1/21/29.
[1551] Answer, Par. 19. GX 535, p. 2101. GX 410, p. 5593.
[1552] GX 536, p. 2102. GX 410, p. 5594.
[1553] Answer, Par. 19.
[1554] GX 530.
[1555] Answer, Par. 8.

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Viscose Development Company, Limited, is a corporation of the United Kingdom with principal place of business at Bromley, Kent, England. It manufactures caps and bands in England.[1556]

1668 741

Cellulosic caps and bands are each closures which are functionally interchangeable with numerous other closures and sold to the same customers for the same purpose at competitive prices.

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In selling cellulosic bands, I. F. Schnier Co., one of duPont's two agents for the sale of bands, encountered competition from other types of closures including the Guardian Seal, made of aluminum, attached to the bottle and requiring no secondary closure; the White Cap, which also requires no secondary closure; the Film-a-Seal, which is a secondary liner adhering to the lip of the bottle, forming a secondary closure; wrap arounds, a laminated foil attached to a paper with an adhesive on the inside giving the same decorative features as a cellulose band; and foil capsules, which are secondary seals.[1557]

743

In selling cellulosic bands Armstrong Cork Co., one of duPont's two agents for the sale of bands, encounters competition with caps on champagne or wine bottles, paper wrap arounds and specialty type closures, such as the aluminum seal roll-on or Guardian Seal. The latter seals compete with Cel-O-Seal bands even though they are primary seals because Armstrong in part claims a tamperproof feature on Cel-O-Seal bands since they must be destroyed before being taken off the bottle.[1558]

744

One reason cellulosic bands have lost business to other materials is it has been possible to apply some other materials automatically

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[1556] Answer, Par. 9.
[1557] Schnier, Tr. 6718–20.
[1558] Feagley, Tr. 6171–73, 6175–76.

by machine whereas no satisfactory machines have been de-
1669 veloped for applying cellulosic bands automatically.[1559]
Efforts have been made by duPont to perfect a machine for the automatic application of cellulosic caps and bands.[1560]

745

Gelatin caps made by Parke-Davis are an illustration of competition between other materials and duPont's cellulosic caps. At one time they were the acute form of competition for duPont's cellulosic caps. They were transparent, had luster, could be shipped and stored in dry form, and their price was frequently lower than duPont's caps.[1561]

746

DuPont engaged in research to develop better cellulosic seals and efficient methods of manufacturing such products. Typical efforts have been duPont's attempts to improve printing,[1562] develop metallic-appearing bands,[1563] achieve higher casting speeds and increase capacity of existing machines.[1564] Result of success of such efforts, quality of duPont's seals has improved and price lowered.[1565]

747

DuPont attempts to apply research to develop seals which are tailor-made. Typical were its production of window bands
1670 for the liquor industry,[1566] seals to be used during airplane manufacture,[1567] cellulose tubing for textile mills,[1568] and seals for coffee and shortening producers.[1569]

748

For years caps and band have been applied by hand to bottles. DuPont recognized desirability of developing automatic machinery which would facilitate application of caps and bands and con-

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[1559] DX 884, p. 1848, 7/31/39. GX 446, p. 5831, 2/12/40. DX 874, p. 1833, 12/8/44. DX 877, p. 1839, 7/24/47. DX 944, p. 1936, 2/6/50. GX 588, p. 7529, 2/7/50.
[1560] GX 498, p. 6832, 1/16/45. DX 874, p. 1833, 12/8/44. DX 595, pp. 1164–65, 2/49. DX 943, pp. 1930–31, 2/8/49. DX 596, p. 1177–78, 4/7/50. Feagler Tr. 6174.
[1561] GX 474, pp. 5962–65, 1929. DX 863, p. 1816, 11/29/33.
[1562] GX 491, pp. 6537–38, 1/20/37. GX 493, p. 6596, 1/20/39.
[1563] GX 501, p. 6921, 1/27/48.
[1564] GX 490, p. 6500, 1/22/36. GX 491, pp. 6537–38, 1/20/37. GX 493, p. 6596, 1/20/39. GX 452, p. 5881, 2/4/47. GX 88, p. 341, 3/10/47. GX 178, p. 507, 11/26/45.
[1565] GX 356, pp. 890–92, 2/27/39.
[1566] GX 491, p. 6537, 1/20/37. Schuler, Tr. 6720.
[1567] GX 451, p. 5879, 2/4/46. GX 449, p. 5866, 1/25/44.
[1568] GX 92, p. 367, 2/5/43.
[1569] GX 451, p. 5879, 1/46. GX 449, p. 5863, 1943.

ducted research to perfect such machines. Automatic machines would enable duPont to sell bands to customers now using other types of closures, such as, in the field of food products, and to broaden its market.[1570]

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DuPont reduced prices on its caps and bands in order to stimulate sales and enable it to compete.[1571]

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Prices for bands were determined as result of competitive market factors and have not been arbitrarily fixed by duPont.[1572]

751

Prior to January 1, 1947, duPont allowed quantity discounts for caps and bands. DuPont paid the quantity discount from its funds regardless of whether customers bought the duPont-made caps and bands from duPont, Schnier or Armstrong.[1573]

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752

Celon and Sylvania have granted more favorable discounts to customers than duPont at times.[1574]

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Types of materials have been sold in the closure market to same classes of customers and for same purposes as cellulosic caps and bands. Competition between these materials and cellulosic caps and bands has been intense.[1575] Materials competing with cellu-

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[1570] DX 863, p. 1814, 11/29/33. DX 866, p. 1821, 6/38. GX 588, 6. 7529, 2/7/50. Feagley, Tr. 6174.

[1571] GX 490, p. 6500, 1/22/36. GX 471, p. 5950, 10/3/38. GX 474, p. 5972, 1929. GX 489, p. 6487, 1/22/35.

[1572] DX 898, pp. 1865–66, 8/2/29. DX 938, p. 1912, 5/21/35. DX 900, p. 1868, 1/6/39. DX 901, p. 1868, 5/8/39. DX 903, p. 1871, 9/13/39. DX 908, p. 1877, 6/12/40. DX 910, p. 1879, 2/5/40. DX 911, p. 1881, 2/18/41. DX 913, p. 1883, 4/30/41. DX 914, p. 1884, 2/13/42. DX 931, p. 1905, 3/28/41. DX 933, p. 1907, 12/3/40. DX 934, p. 1908, 6/6/41. DX 935, p. 1909, 5/31/45. GX 489, p. 6487, 1/22/35. GX 490, p. 6500, 1/22/36. GX 471, p. 5950, 10/3/38. GX 356, p. 890, 2/27/39. GX 493, p. 6954, 1/20/39. GX 90, pp. 350–51, 2/2/39. GX 448, p. 5854, 2/5/42. Yerkes, Tr. 6956.

[1573] GX 5034, pp. 4511–13, 11/29/46. Feagley, Tr. 6168.

[1574] DX 938, p. 1912, 5/21/35. DX 903, p. 1871, 9/13/39. DX 908, p. 1877, 6/12/40. DX 909, p. 1878, 11/5/40. DX 910, p. 1879, 12/5/40. DX 913, p. 1880, 4/30/41.

[1575] GX 491, p. 6537, 1/20/37. GX 474, pp. 5956–58, 62–65, 82, 1929. GX 474, pp. 5956–83, 1929. GX 492, p. 6561, 1/25/38. GX 90, pp. 352, 354, 2/2/39. GX 1316, p. 1665, 3/25/46. GX 446, p. 5831, 2/12/40. GX 1391, p. 1792, 11/13/45. GX 451, p. 5879, 1/46. GX 594, pp. 1145–46, 1148. DX 595, p. 1163, 1949. DX 868, p. 1825, 6/29/39. DX 870, p. 1827, 3/6/40. DX 871, pp. 1828–29, 2/11/41. DX 872, p. 1830, 3/26/42. GX 588, Book 43, pp. 7528–29, 2/7/50. See also DXs 863–67, 869, 873–98, 941–44. Schnier, Tr. 6718–19. Feagley, Tr. 6171–73, 6175–76.

losic caps and bands for similar end uses include products variously designated in the trade:

1. Aluminum Caps and Seals.[1576]
2. Metal Foil Caps.[1577]
3. Aluminum Foil Capsules.[1578]
4. Gold Foil Capsules.[1579]
5. Foil Wrap Arounds.[1580]
6. Metallic Papers.[1581]

1672 7. Film-A-Seal.[1582]

8. Gelatin Caps.[1583]
9. Metal Screw Caps.[1584]
10. Corks.[1585]
11. Bakelite Caps.[1586]
12. Tape.[1587]
13. Lacquer Dipping.[1588]

754

At times cellulose seals and other materials have sold in the closure market to same customers for similar end uses including:[1589]

1. Distilleries.
2. Wineries.
3. Breweries.
4. Soft Drinks.
5. Bottled Water.
6. Other Beverages.
7. Food.
8. Drugs.
9. Chemicals.
10. Toilet Preparations.
11. Perfumes.
12. Airplane Parts.
13. Fire Extinguishers.
14. Textile Mills.

[1576] See DXs cited, Tr. 5193. GX 491, p. 6537, 1/20/37. GX 492, p. 6561, 1/25/38. GX 89, p. 347, 2/1/38. GX 446, p. 5832, 2/12/40.
[1577] See DXs cited, Tr. 5194. GX 89, p. 347, 2/1/38. GX 1316. DX 942, p. 1927, 2/4/48.
[1578] See DXs cited, Tr. 5194. GX 89, p. 347, 2/1/38.
[1579] DX 871, p. 1829, 2/11/41.
[1580] See DXs cited, Tr. 5193. DX 943, pp. 1930–31, 2/8/49. DX 944, p. 1935, 2/6/50.
[1581] See DXs cited, Tr. 5193. GX 449, pp. 5866–67, 1/25/44.
[1582] See DXs cited, Tr. 5193. DX 944, p. 1936, 2/6/50.
[1583] See DXs cited, Tr. 5194. GX 474, pp. 5956–58, 62–65, 82, 1929. GX 90, pp. 352, 358, 2/2/39. GX 446, pp. 5834–35, 2/12/40. GX 83, p. 318, 2/27/42. DX 944, p. 1936, 2/6/50.
[1584] DX 895, p. 1860, 12/29/49. GX 474, p. 5967–71, 82, 1929.
[1585] DX 895, p. 1860, 12/29/49. DX 491, p. 6537, 1/20/37. DX 944, p. 1936, 2/6/50.
[1586] GX 474, pp. 5969–71, 1929.
[1587] DX 863, p. 1816, 11/29/33.
[1588] See DXs cited, Tr. p. 5193. DX 944, p. 1936, 2/6/50.
[1589] GX 474, p. 5955, 1929. GX 448, pp. 5851, 5854, 2/5/42. DX 941, p. 1925, 1/23/45. DX 942, pp. 1926–27, 2/4/48. DX 943, pp. 1928–32, 2/8/49.

1673 755

DuPont endeavored to expand the market for bands by selling bands for new uses.[1590]

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The bulk of duPont's cellulosic band business is in the wine and liquor trade.[1591] DuPont has lost business in these trades due to competition from other materials.[1592] Other materials have been used to replace cellulosic bands in the wine and liquor trades including lead and aluminum foil wrap arounds, and various metal closures.[1593] Certain roll-on "tamper proof" metal closures have constituted a threat to use of cellulosic caps and bands due to their economy, since they were designed to act as a primary and secondary closure and can be applied automatically by machinery in one operation.[1594]

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Armstrong's important outlet for duPont's bands at present is liquor trade. Customers in liquor trade to whom it tries to sell bands are prospects for all types of bottle closures.[1595]

758

Result of competition between cellulose caps and bands and other materials has been shifting customers from one material to another. Customers using cellulosic caps and bands often
1674 shifted to other types of closures while customers using other types of closures shifted to cellulosic caps and bands.[1596]

This is illustrated by competition between cellulose caps and bands and other types of closures over a period of years from 1929 to 1949. In 1929 there was competition from gelatin caps made by Parke-Davis, and duPont was endeavoring to develop new uses for cellulose caps to offset loss of volume to other manufacturers;[1597] in 1936, National Distillers and Seagram's changed

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[1590] GX 447, pp. 5845–46, 2/21/41. GX 448, p. 5857, 2/5/42. GX 92, pp. 363–64, 2/5/43. GX 449, p. 5860, 5863–64, 1/25/44. GX 85, p. 328, 2/28/44. DX 877, p. 1839, 7/24/47. DX 943, p. 1930–31, 2/8/49.

[1591] GX 588, p. 7527, 2/7/50.

[1592] DX 868, p. 1825, 6/29/39. GX 446, p. 5831, 2/12/40. GX 446, p. 5832, 2/12/40. DX 874, p. 1833, 12/8/44. DX 888, p. 1852, 12/5/47. DX 890, p. 1854, 5/6/48. DX 891, p. 1855, 5/14/48. DX 594, p. 1146, 1948. DX 595, p. 1163, 1949. DX 943, pp. 1930–31, 2/8/49. DX 944, pp. 1934–36, 2/6/50.

[1593] DX 595, p. 1163, 1949. DX 944, pp. 1935–36, 2/6/50.

[1594] GX 588, p. 7529, 2/7/50.

[1595] Feagley, Tr. 6176.

[1596] DX 594, pp. 1146, 1948. DX 880, p. 1843, 1/8/41. DX 943, p. 1930, 2/8/49. GX 451, p. 5879, 1/46. DX 874, pp. 1832–33, 12/8/44. DX 877, p. 1839, 7/24/47. DX 884, p. 1848, 7/31/[illegible]. DX 888, p. 1852, 12/5/47. DX 890, p. 1854, 5/6/48. DX 898, pp. 1865–66, 8/2/29.

[1597] GX 474, pp. 5956–58, 5962–65, 5982, 1929.

from aluminum seals to wood-embossed top corks and cellulose bands;[1598] in 1937 cellulose bands cut into the business of the Aluminum Seal Company and it started advertising campaign aimed at duPont bands;[1599] in 1938 sales of 525,000 bands were lost in favor of foil in the beverage industry;[1600] in 1939 duPont lost business of Gluek Brewing Co., which changed to coil;[1601] and of Century Distilling Company which changed from bands to aluminum Guardian Seal;[1602] in 1948, following a period of less active competition during the war years due to governmental limitation orders,[1603] there was pressure from manufacturers of metal foil and aluminum closures, with large distillers such as Frankfort Distilling Company, Schenley's and National Distillers becoming more interested in those closures;[1604] and in 1949 lead and aluminum foil and aluminum tamper-proof closures continued to make inroads on the cellulose bands business.[1605]

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Shifts of customers between cellulose caps and bands and other types of closures have occurred at times for various reasons, including price,[1606] quality,[1607] service,[1608] decorative effect,[1609] drying time and odor of cellulose seals,[1610] and suitability for machine application.[1611]

760

DuPont estimated it lost the sale of 30 million bands in the first six months of 1950 to aluminum seals, which have advantage of machine application and fact consumer can break the seal easily.[1612]

761

DuPont encounters continuing competition in the sale of bands from other manufacturers of cellulosic bands, including Celon and Sylvania, on the basis of quality and service.[1613]

[1598] GX 491, p. 6537, 1/20/37.
[1599] GX 492, p. 6561, 1/25/38.
[1600] GX 90, p. 354, 2/2/39.
[1601] GX 446, p. 5831, 2/12/40.
[1602] GX 446, p. 5832, 2/12/40. DX 868, 6/29/39.
[1603] GX 449, pp. 5864, 5867, 1/25/44. GX 451, pp. 5879–80, 2/4/46.
[1604] DX 891, p. 1855, 5/14/48. DX 943, pp. 1930–31, 2/8/49. DX 594, p. 1146, 1948. DX 595, p. 1163, 1949.
[1605] DX 944, pp. 1934–36, 2/6/50. GX 588, pp. 7528–29, 2/7/50.
[1606] DX 398, p. 1912, 5/21/35. DX 944, p. 1936, 2/6/50.
[1607] DX 906, p. 1874, 4/5/40. DX 907, p. 1875, 4/16/40.
[1608] DX 917, p. 1887, 5/14/43.
[1609] DX 920, p. 1890, 6/15/45.
[1610] DX 863, p. 1812, 11/29/33.
[1611] DX 874, p. 1833, 12/3/44.
[1612] GX 586, p. 7336, 1950.
[1613] DX 920, p. 1890, 6/15/45. DX 937, p. 1911, 2/5/48. DX 943, p. 1930, 2/8/47. DX 941, pp. 1915–25, 1/23/45. GX 588, p. 7528, 2/7/50. DX 942, p. 1927, 2/4/48. DX 595, p. 1162, 1949. DX 944, p. 1935, 2/6/50. Feagley, Tr. 6176–78. Schnier, Tr. 6716–18.

762

Price competition has existed between duPont, Celon and Sylvania as to caps and bands and exists to bands now du-
1676 Pont has withdrawn from manufacture of caps.[1614] This is illustrated by shifts of caps and band customers between duPont, Ceylon and Sylvania on the basis of price.[1615]

763

Plaintiff conceded prices of the three producers of caps and bands have not been identical, and offered no proof of extent of price differences between the producers.[1616]

764

Competition between duPont, Celon and Sylvania, all of which manufacture cellulose seals for sale in the closure market, is illustrated by shifts in quantity of seals sold by these manufacturers for various end uses. This is demonstrated by a recapitulation of the sales of cellulose seals for different end uses in the years 1948[1617] and 1949:[1618]

Sales of cellulose seals by trade class—M Units

	DuPont		Celon		Sylvania		Total sales for industry
	1948 sales	Percent of industry	1948 sales	Percent of industry	1948 sales	Percent of industry	
Drugs	83,239	76	22,939	21	2,740	3	108,918
Toilet preparations	9,182	29	22,500	70	300	1	31,982
Food products	24,927	81	5,595	18	135	1	30,65
Beverages	3,057	67	1,550	33			4,607
Distilleries	649,580	63	351,255	34	36,058	3	1,036,893
Wineries	246,167	61	139,025	34	19,650	5	404,842
Water bottlers	4,700	45	5,800	55			10,500
Chemicals	40,369	70	7,670	15	3,160	6	51,199
Miscellaneous	11,560	62	7,025	37	200	1	18,785
Total	1,072,781	63	563,359	33	62,243	4	1,698,383

[1614] GX 474, pp. 5966, 77, 82, 85, 1929. GX 322, pp. 811, 830, 2/16/33. DX 938, p. 1912, 5/21/35. GX 89, p. 345, 2/1/38. DX 939, p. 1913, 1/18/38. DX 901, p. 1869, 5/8/39. GX 90, pp. 349–50, 2/2/39. DX 927, p. 1900, 4/16/40. DX 910, p. 1879, 12/5/40. DX 931, p. 1905, 3/28/41. Yerkes, Tr. 6956.

[1615] GX 474, pp. 5979, 5982, 1929. DX 898, pp. 1865–1866, 8/2/29. GX 90, p. 351 2/2/39. DX 905, p. 1873, 11/21/39. DX 928, p. 1901, 4/17/40. DX 931, p. 1905, 3/28/41. DX 934, p. 1908, 6/6/41. DX 935, p. 1909, 5/31/45. GX 448, p. 5854, 2/5/42.

[1616] Cook, Tr. 2200–01. Renninger, Tr. 1967.

[1617] DX 595, p. 1160, 1949.

[1618] GX 588, p. 7527, 2/7/50.

1677	DuPont		Celon		Sylvania		Total sales for industry
	1949 sales	Percent of industry	1949 sales	Percent of industry	1949 sales	Percent of industry	
Drugs	89,964	76	23,597	20	3,860	4	117,421
Toilet preparations	8,271	28	20,600	69	1,050	3	29,921
Food products	26,350	85	3,895	13	635	2	30,880
Distillers	584,551	63	309,851	33	40,981	4	935,383
Beverages	4,274	96	180	4			4,454
Wineries	245,014	64	118,119	31	21,275	5	384,408
Water bottlers	5,901	61	3,750	39			9,651
Chemicals	51,044	82	9,705	16	1,975	2	61,824
Miscellaneous	12,504	60	6,000	29	2,400	11	20,904
Total	1,027,873	64	495,697	31	71,276	5	1,594,846

765

No evidence was shown as to number of patents owned by Sylvania, Celon or third parties relating to caps and bands.

766

During past years duPont expanded productive facilities for bands. Expansions were made for variety of business reasons such as: to meet an increasing demand;[1619] to handle peak seasonal requirements;[1620] to reduce costs and price to expand sales;[1621] to penetrate lower priced markets;[1622] to meet forecasted sales;[1623] to recover trade which had switched to competitors during a shortage;[1624] or to relieve a supply shortage and regain business lost to competitors.[1625]

1678

767

There is no proof duPont ever expanded productive facilities for bands in excess of the forecasted demand for purpose of discouraging new competition.

768

No proof was shown potential competitors were excluded from manufacture of caps and bands as a result of any act done by duPont.

[1619] GX 488, p. 6475, 1/22/34.
[1620] GX 428, p. 5659, 4/23/35.
[1621] GX 490, p. 6500, 1/22/36.
[1622] GX 355, p. 889, 8/30/38.
[1623] GX 498, p. 6832, 1/16/45. GX 178, p. 507, 11/26/45. GX 179, p. 508, 12/18/45.
[1624] GX 452, p. 5881, 2/4/47.
[1625] GX 88, p. 341, 3/10/47

769

No proof was shown duPont had any agreement with other producers of bands to exclude others from this business.[1626]

770

No proof was shown duPont excluded Visking from manufacture and sale of caps and bands.

771

No proof was shown American Viscose was excluded from the manufacture and sale of caps or bands by duPont.

772

There is no proof any distributors of caps and bands were excluded from the manufacture of caps and bands as a result of any action by duPont.[1627]

773

Armstrong Cork Company was never interested in manufacturing cellulose caps or bands. Armstrong devoted its money to a planned program of expansion along other lines.[1628]

1679

774

Although certain contracts between duPont and Armstrong, distributor for duPont caps and bands, contained a provision under which Armstrong agreed not to manufacture caps and bands,[1629] Armstrong did not regard this as exclusionary since Armstrong was not interested in manufacturing competing line of caps and bands.[1630]

775

I. F. Schnier Co., Inc., a duPont band distributor, never desired to manufacture cellulose caps or bands. This was due to business reasons unrelated to any contract with duPont.[1631]

776

Contracts between duPont and I. F. Schnier and Company, distributor for duPont caps and bands on the West Coast, con-

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[1626] Reichel, Tr. 6046.
[1627] Schnier, Tr. 6712–14, 6727–31. Feagley, Tr. 6159–65, 6184–87.
[1628] Feagley, Tr. 6162–65, 6185–86.
[1629] GX 5290, p. 5033, 1/7/42.
[1630] Feagley, Tr. 6162–63.
[1631] Schnier, Tr. 6712–14, 6727–31.

tained a provision under which Schnier agreed not to manufacture caps and bands;[1632] Schnier did not consider this an interfering factor.[1633] Schnier did not regard this clause as having an exclusionary effect because Schnier did not desire to engage in the manufacture of caps and bands.[1634]

777

Price reductions were made by duPont because of lowering cost resulting from duPont's research and development and desire to broaden markets and to meet competitors' prices. Such price reductions were never made with the intent of excluding potential competition.[1635]

1680

778

DuPont was interested in activities of other concerns which manufactured caps and bands. This included obtaining samples of these competitive materials from different sources.[1636] DuPont's purpose in seeking information represented nothing more than desire as a matter of business to be acquainted with all competitive developments.[1637]

779

No evidence was shown duPont did or now controls distribution outlets for caps and bands in the United States.

780

Both Celon and Sylvania use distributing organizations of substantial size as outlets for the cellulosic seals they produce.[1638]

781

DuPont sells bands to some purchasers in the United States. It markets its bands through a number of distributors including I. F. Schnier Co., Inc. and Armstrong Cork Co. in the United States and Freysing Cork Co. and Armstrong Cork Co. in Canada.[1639]

[1632] GX 5288, pp. 5027–31, 9/8/39.
[1633] Schnier, Tr. 6727–28. GX 4519, p. 7860, 6/20/47.
[1634] Schnier, Tr. 6730.
[1635] GX 489, p. 6487, 1/22/35. GX 490, p. 6500, 1/22/36. GX 471, p. 5950, 10/3/38. GX 356, p. 890, 2/27/39.
[1636] GX 4304, p. 4195, 3/23/42. GX 4313, p. 4207, 8/12/48. GX 4315, p. 4207, 8/12/43. GX 4481, p. 6268, 10/27/45
[1637] GX 4312, p. 4204, 7/3/43. GX 4305, p. 4196, 3/27/42. GX 4310, p. 4202, 4/15/43. GX 4360, p. 4272–73, 11/19/45.
[1638] DX 925, p. 1898, 4/50. DX 926, p. 1899, 4/50. GX 322, p. 807, 2/16/33.
[1639] GX 446, p. 5834, 2/12/40. GX 1269, p. 1596, 5/15/31. Schnier, Tr. 6711–15. Feagley, Tr. 6159.

782

I. F. Schnier and Co. is not owned by duPont and duPont does not tell Schnier to whom Schnier can sell bands.[1640] Although there are other manufacturers of cellulose bands in the United States, no manufacturer other than duPont has approached
1681 Schnier to be its distributor, nor has Schnier applied to other manufacturers of cellulose bands in the U. S. to be their distributor.[1641]

783

Although Armstrong has sold only duPont bands rather than Celon or Sylvania, it has done so as a matter of business judgment, preferring to promote use of duPont's bands. Neither Celon nor Sylvania has approached Armstrong to sell their bands, nor has Armstrong sought to handle bands manufactured by Celon or Sylvania.[1642]

784

DuPont filed its patent applications to protect its own research.[1643]

785

DuPont's licenses to manufacture bands were offered to any applicant at reasonable royaltjes.[1644]

786

DuPont has granted licenses to others under its patents pertaining to manufacture of caps and bands at reasonable royalties. These included licenses granted by duPont under the Webster, Fletcher and Vautier and Fays patents to Celon.[1645] The same patents were licensed to Sylvania royalty-free in exchange for three Sylvania patents.[1646]

787

Patent interferences between duPont and other manufacturers of bands were settled from time to time. No evidence was shown

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[1640] Schnier, Tr. 6723–24.
[1641] Schnier, Tr. 6715.
[1642] Feagley, Tr 6179, 6183–84.
[1643] W. W. Smith, Tr. 6508–09.
[1644] Olsen, Tr. 6843–44. W. W. Smith, Tr. 6517. GX 2248, p. 2575, 8/11/39. GX 2254, p. 2583, 1/1/40. GX 2262, p. 2599, 2/2/42. GX 2296, p. 2646, 8/2/42.
[1645] GX 2242, p. 2565, 5/11/36. GX 2254, p. 2583, 1/1/40.
[1646] GX 2296, p. 2646, 8/2/42.

these settlements were arrived at as result of anything other
1682 than arm's-length negotiations, or were made for the purpose of deterring potential competition.[1647]. Disputes so settled included Interference 79985 between duPont and Celon [1648] and Interference 73679 among duPont, Celon and Sylvania.[1649]

788

DuPont was owner of a patent (Vautier & Fays) covering method of manufacturing bands with alternating transparent and opaque sections, a type known as "Wind-O-Band" by duPont. It was owner of a patent (Evans) covering the combination of such a band, a liquor bottle, and a revenue stamp. Both patents were licensed by duPont to all other U. S. producers of cellulose bands.[1650]

789

DuPont never had an arrangement with Celon or Sylvania as owners of patents pertaining to caps and bands seeking to use those patents to monopolize or to exclude potential competitors from manufacture of caps and bands.[1651]

790

No proof was shown duPont ever had arrangement with any owners of patents on caps and bands seeking to use them to monopolize or to exclude others from manufacture of caps or bands.

791

DuPont never entered into agreement or conspiracy with Sylvania fixing producer's prices or resale prices of bands.[1652]

1683 792

DuPont never entered into agreement or conspiracy with Celon fixing prices or resale prices of bands.[1653]

[1647] Reichel, Tr. 6046.
[1648] GX 2294, pp. 2639–43, 7/15/42.
[1649] GXs 2224–34, pp. 2518–53, 1937–38.
[1650] GX 2242, p. 2565, 5/11/36. GX 2254, p. 2583, 1/1/40. GX 2296, p. 2646, 8/2/42.
[1651] Reichel, Tr. 6046.
[1652] Reichel, Tr. 6045. Yerkes, Tr. 6947, 6956.
[1653] Yerkes, Tr. 6959. E. g.: GX 322, p. 830, 1/24/33. DX 901, p. 1869, 5/8/39.

793

DuPont and Celon did not agree on standardization of cap or band sizes. In 1934 and thereafter each company used its own method of designating size.[1654]

794

Celon and Sylvania were not bound by agreement to follow duPont's price for caps or bands, and have sold at prices different from duPont.[1655]

795

DuPont never entered into agreement or conspiracy with I. F. Schnier fixing prices or resale prices of bands,[1656] and Schnier, in fact, sells duPont bands at prices different from duPont list prices.[1657]

796

DuPont never entered into agreement or conspiracy with Armstrong Cork Co. fixing prices or resale prices of bands.[1658]

797

DuPont never entered into agreement or conspiracy with anyone fixing prices or resale prices of bands.[1659]

1684

798

Imports of bands have been excluded by a prohibitive U. S. tariff, 60% ad valorem, which has been in effect since 1922.[1660]

799

At time of purchasing Capes-Viscose, Inc., duPont did not know there were any territorial restrictions upon that company. Such restrictions were eliminated shortly after duPont learned of them.[1661]

800

In 1930, duPont entered into agreements for exchange of process, technical information, licenses, and patent applications with two

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[1654] GX 333, p. 847, 4/16/34.
[1655] GX 5390, p. 5209, 3/20/44. GX 332. GX 322, p. 830. GX 492, p. 6560, 1/28/38. GX 89, p. 345, 2/1/38. GX 90, pp. 349–50, 356, 2/2/39. GX 448, p. 5854, 2/5/42. YerRes, Tr. 6956.
[1656] GX 5567A, 1/30/48.
[1657] Schnier, Tr. 6715–16.
[1658] Feagley, Tr. 6166–68.
[1659] Yerkes, Tr. 6947, 6956. Reichel, Tr. 6045. GX 5567A, 1/30/48.
[1660] Act of September 21, 1922, c. 356, 42 Stat. 863.
[1661] Yerkes, Tr. 6954–55. GX 1217, 5/3/29. GX 1222, p. 1503, 7/1/29.

foreign manufacturers of viscose bottle caps, the Viscose Development Company in England[1662] and Viscose Francaise in France.[1663] Latter was an affiliate of La Cellophane.[1664]

801

In Spring of 1930, duPont, VDC and Viscose Francaise entered into letter agreements which stated the countries where each manufacturer of caps and bands was to have exclusive selling rights.[1665] DuPont Legal Department approved execution of these letters in belief the territorial divisions were based upon secret processes for manufacture of caps and bands acquired by duPont from Capes-Viscose.[1666]

1685 802

Legal Department investigated and clarified circumstances of purchase of Capes-Viscose, and nature of processes and territorial commitments acquired with it. Legal Department then directed the territorial letter agreements be cancelled.[1667] This was done in the Autumn of 1930.[1668] Cancellations were final, and bona fide.[1669]

803

Following cancellation of these letter agreements, duPont observed no territorial limitations upon its exports of caps and bands. Exports were made to countries where, had the letter agreements remained in effect, duPont would not have been permitted to sell.[1670] Limitations upon the quantity of these products exported have been: (1) export shipment of caps and bands is made in containers of solution, which make shipments bulky and heavy;[1671] (2) cheaper prices for caps prevail in markets supplied by Viscose Francaise and VDC.[1672]

804

In 1941 VDC informed duPont of an inquiry from Lockheed Aircraft Corporation for printed bands.[1673] DuPont owned

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[1662] GX 1260, p. 1584, 1/1/30. GX 1120, p. 1265, 2/7/41.
[1663] GX 1245, p. 1561, 1/1/30.
[1664] Answer, Par. 8.
[1665] GX 1246, p. 1565, 5/29/30. GX 1247, p. 1566, 7/1/30. GX 1237, p. 1546, 5/29/30. GX 1261, p. 1588, 5/29/30. GX 1262, p. 1589, 6/24/30.
[1666] GX 1226, p. 1528, 8/26/29.
[1667] GX 1252, p. 1571, 9/30/30. GX 1253, p. 1574, 10/1/30. Yerkes, Tr. 6954-5. DX 946, p. 1938, 8/29/30. DX 947, p. 1939, 8/30/30. DX 948, p. 1942, 10/9/30. DX 949, p. 1944, 10/24/30.
[1668] GX 1249, p. 1568, 11/7/30. GX 1257, p. 1580, 11/22/30. GX 1264, p. 1591, 11/11/30.
[1669] GX 1314, p. 1661, 5/13/43. GX 1315, p. 1664, 5/20/43.
[1670] GX 1391, p. 1791, 11/13/45. GX 399, 5/15/50.
[1671] GX 999, p. 14, 10/41.
[1672] GX 506, pp. 6953, 1/23/41. DX 964, p. 1967, 2/21/41.
[1673] GX 1318, p. 1667, 5/26/41.

Fletcher Patent 1,997,769 on printed bands. It advised VDC due to the patent, duPont had exclusive right to make and sell printed bands in the United States, but VDC was completely free to compete with duPont in any country in the world except as prevented by patents.[1674]

1686 805

Technical agreement between duPont Cellophane Company and Viscose Francaise was terminated in 1941 in the circumstances and on the basis as the agreement between La Cellophane and duPont Cellophane Company.[1675]

806

DuPont terminated its technical agreement with VDC in 1947.[1676]

807

Technical agreements between duPont, Viscose, Francaise and VDC as to caps and bands did not have effect of channeling duPont world technology as to caps or bands. Both Celon and Sylvania have manufactured and sold these products in the United States without receipt of technical information from duPont.

808

No proof was shown the terminated technical agreements with VDC and Viscose Francaise are continuing or will be revived.

809

No proof was shown duPont attempted to monopolize manufacture of caps and bands.

810

DuPont had opportunity to purchase Celon in 1933, and declined to do so.[1677]

811

DuPont's position in manufacture of cellulosic caps and bands has declined over a period of years. This is evident from
1687 study of the trend of annual quantity production of caps and bands in units by duPont, Sylvania and Celon at regular intervals, beginning with 1929 and running through 1949:

[1674] GX 1322, p. 1673, 7/11/41.
[1675] GX 1286, p. 1624, 2/5/45. GX 1278, p. 1609, 12/31/49. GX 1279, p. 1613, 3/26/41.
[1676] DX 950, p. 1946, 6/5/47.
[1677] DX 945, p. 1937, 4/26/33.

Annual quantity production of cellulosic caps and bands

[Thousand units]

Year	Total	DuPont	Sylvania	Celon [1678]
1929	97,845	68,426	0	29,419
1933	103,204	86,715	294	16,195
1937	912,446	721,456	51,670	139,320
1941	1,712,523	1,170,675	103,254	438,594
1945	2,017,951	1,314,962	101,754	601,235
1949 [1679]	1,594,846	1,027,873	71,276	495,697

Percent of total production

Year	DuPont	Sylvania	Celon [1679]
	Percent	*Percent*	*Percent*
1929	69.9		30.1
1933	84.0	0.3	15.7
1937	79.1	5.7	15.3
1941	68.4	6.0	25.6
1945	65.2	5.0	29.8
1949 [1679]	64.4	4.5	[1680] 31.1

812

No proof was shown general decline over a period of years in percentage duPont's output represents of the total annual domestic output of caps and bands will be slackened or reversed.

813

Sylvania has expanded output and production facilities for bands since it began manufacturing bands. Its first
1688 machine was built in 1934, the second in 1940, the third in 1945 and the fourth in 1947.[1681]

814

Celon has expanded its output and production facilities for bands since it first began manufacturing bands.[1682]

815

DuPont has not produced or sold caps since May 31, 1947.[1683]

[1678] Sales figures.
[1679] Estimated domestic sales figures (exports not included).
[1680] GX 393, p. 5477, 5/15/50. GX 410, pp. 5593–94, 2/1/50. GX 530, 1/5/51. GX 535. GX 536. DX 944, p. 1934, 2/6/50. GX 588, p. 7526, 2/7/50.
[1681] GX 410, pp. 5600–91, 1/1/50.
[1682] GX 530, 1/5/51. Cook, Tr. 2100.
[1683] GX 500, p. 6891, 1/14/47. DX 943, p. 1928, 2/8/49. GX 393, p. 5477, 5/15/50.

816

Celon's percentage of the total annual production of cellulosic caps increased from time it first began to manufacture caps and it now accounts for 100% of domestic production of caps.[1684]

817

DuPont's percentage of total annual domestic sales of bands decreased from 100% in 1929 to 64% in 1947.[1685]

818

Celon's percentage of annual domestic sales of cellulosic bands increased from 12% in 1934 to 30% in 1947.[1686]

819

No proof was shown duPont's return on its investment in manufacture of caps and bands was greater or less than return earned by Sylvania, and by Celon on their investments in such manufacture.

1689 OTHER FACTS

(Findings 820–834)

820

With consent of counsel, I visited duPont's Richmond plant to observe production of cellophane. I also attended the 1952 Annual Packaging Show at Atlantic City to observe exhibits offered by machinery manufacturers, converters and manufacturers of flexible packaging materials. Physical samples of different types of packaging materials and converted wraps were presented during trial and judicial notice taken of trade publications and writings pertaining to flexible packaging materials. These sources confirmed pertinent findings found herein.

821

Each narrative summary of depositions, admitted in evidence as DX 1006–1021, is an accurate statement of contents of the deposition to which it refers. Such summaries were admitted in evidence without objection by plaintiff as to accuracy and com-

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[1684] GX 536. GX 530, 1/5/51. GX 393, p. 5477, 5/15/50. GX 410, p. 5594, DX 943, pp. 1928–29, 2/8/49. DX 595, p. 1159, 1949. GX 588, p. 7526, 2/7/50.
[1685] GX 544.
[1686] GX 544.

pleteness. Plaintiff has not demonstrated any material inaccuracy or omission in such summaries.[1687]

822

B. M. May was unable to testify on behalf of defendant due to condition of his health.[1688]

823

DuPont requires salesmen to submit regular trade reports reflecting each call made. DuPont uses such reports for information on gain and loss of business, of trends in merchandising, on need for technical service, etc. Such trade reports are relied upon by duPont's sales management in the course of its business.[1689]

1690 824

For purpose of obtaining data on distribution of cellophane as a guide to plans for future promotion and advertising, and efficiency of salesmen in the territory, duPont requested converters to inform it monthly of their shipments of duPont cellophane. During World War II, such reports were required by Limitation Order 20 to insure cellophane was being employed in permitted uses.[1690]

825

For purpose of enabling duPont to compete, duPont obtained information as to products, selling efforts, and activities of other flexible packaging material manufacturers, including Sylvania.[1691] It did not use unlawful methods to obtain information, but relied on observation of its customers, and upon analysis of competing products.[1692]

826

DuPont preferred sales of moistureproof cellophane types because of greater potential sales of such types, more satisfactory performance as a packaging material, larger production possible with the same equipment, and greater return on investment.[1693]

[1687] Tr. 6874–82.
[1688] DX 1087 (Imp. Doc. No. 71).
[1689] R. R. Smith, Tr. 5828–33.
[1690] Limitation Order 20. GX 5601, p. 7912, 10/23/43. GX 5602, p. 7913, 10/23/43. GX 5603, p. 7914, 1/14/44. GX 5604, p. 7917, 8/15/47.
[1691] McCune, Tr. 5584. E. g.: GX 4302, p. 4187, 4/1/43. GX 4303, p. 4194, 8/31/45. GX 4319, p. 4211, 3/30/45. GX 4340, p. 4243, 3/15/43.
[1692] E. g., DXs 46–49, pp. 80–105. DX 67, p. 150, 8/15/49. DX 78, p. 175, 6/18/34. DX 193, p. 385, 7/18/34. DX 322, p. 614, 12/8/32. DXs 592–594, pp. 1129–46.
[1693] DX 595, p. 1151, 1948.

827

Increasing importance of moistureproof cellophane as compared to plain resulted from demand of consumers for a packaging material which would resist transmission of moisture va-
1691 por.[1694] Predominance of moisture cellophane as opposed to plain has been common to both duPont and Sylvania. Moistureproof-plain ratio of duPont sales changed from 44/17 in 1937 to 112/20 in 1947; while the ratio of Sylvania sales changed from 12/6 in 1937 to 34/5 in 1947.[1695] Predominance of moistureproof cellophane sales has been marked in case of Sylvania even more than in that of duPont. Use of plain cellophane and moistureproof cellophane is to a large degree mutually exclusive among cellophane users, since type used depends upon type of packaging required by the consumer's particular product.[1696]

828

Spread between duPont's prices for 300-gauge plain film and 300-gauge moistureproof transparent film has narrowed over the years. Taking pound price of roll stock, this spread was 35¢ in 1928 when list prices for moistureproof film were first published,[1697] declined to 30¢ in October 1930,[1698] to 25¢ in 1931,[1699] to 22¢ in 1932,[1700] to 18¢ in 1933,[1701] to 11¢ in 1935,[1702] to 10¢ in 1938,[1703] to 8¢ in 1939,[1704] and to 2¢ in 1947.[1705]

829

Glycerin shortage curtailed production of plain film but did not have the effect on production of moistureproof film when substitute softeners were found.[1706]

1692 830

During World War II restrictions on use of raw materials, particularly glycerin, required duPont to curtail production of plain cellophane.[1707] For a time duPont was unable to fill orders for plain cellophane and the continuing inability to obtain glyc-

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[1694] DX 595, p. 1151, 1948. DX 341, p. 655, 8/15/27. DX 346, p. 661, 8/1/29. GX 433, p. 5712. GX 435, p. 5728, 7/21/30.
[1695] GX 395, p. 5488. GX 411, p. 547.
[1696] GX 444, p. 5810, 2/9/37.
[1697] GX 398, p. 5525—November 30, 1928.
[1698] GX 398, p. 5533—October 1, 1930.
[1699] GX 398, p. 5537—August 1, 1931.
[1700] GX 398, p. 5541—May 2, 1932.
[1701] GX 184, p. 519—Jan. 11, 1933.
[1702] GX 101, p. 524—Dec. 1935.
[1703] GX 190A, p. 531B—Dec. 1938.
[1704] GX 191, p. 533—Oct. 1939.
[1705] GX 398, p. 5543—October 1, 1947.
[1706] GX 496, p. 6769, 1/21/43. GX 372, p. 926, 1/22/43.
[1707] GX 496, p. 6769, 1/21/43. GX 372, p. 926, 1/22/43. GX 92E, p. 376, 1/19/43.

erin caused duPont to sell moistureproof cellophane to users who would have preferred plain cellophane.[1708]

831

Prior to January 1, 1947, duPont had higher prices for orders of less than 500 lbs. of cellophane rolls than those for orders of 500 lbs. and over, and higher prices for orders of less than 1,000,000 square inches of sheets than those for orders of less than 1,000,000 square inches.[1709] Sylvania continues to quote higher prices for less than 500 pound roll orders.[1710]

832

Prior to November 1, 1941, when manufacture of stock size sheets was discontinued, duPont had lower price for a given area of a type of cellophane in stock size sheets than for the same area when furnished in cut-to-size sheets.[1711]

833

DuPont has charged different prices for colored cellophane as compared to uncolored cellophane, and different prices for different thicknesses of the same type of cellophane.[1712]

1693

834

No proof was shown Birn and Wachenheim did not receive from La Cellophane every sheet of cellophane to which it was entitled under its contract with La Cellophane.[1713]

Conclusions of the Master Facts

(Findings 835–854)

835

The record establishes duPont has not monopolized trade and commerce in cellophane or in caps and bands.

[1708] GX 2723, p. 3572, 5/21/46.
[1709] E. g., GX 192, p. 535, 11/1/41. DX 370, p. 692, 12/30/46.
[1710] DX 591, p. 1128.
[1711] E. g., GX 191, p. 533, 10/30/39.
[1712] E. g., GX 192, p. 535, 11/1/41.
[1713] GX 4457A, 11/10/22. GX 4457, p. 6230, 6/4/23. GX 1006, pp. 1136, 8/25/23. Roache, Tr. 3391–92, 3398.

836

The record establishes duPont has not attempted and is not attempting to monopolize trade and commerce in cellophane or in caps and bands.

837

The record establishes duPont has not combined to monopolize trade and commerce in cellophane or in caps and bands.

838

The record establishes plain cellophane and moistureproof cellophane are each flexible packaging materials which are functionally interchangeable with other flexible packaging materials and sold at same time to same customers for same purpose at competitive prices; there is no cellophane market distinct and separate from the market for flexible packaging materials; the market for flexible packaging materials is the relevant market for determining
1694 nature and extent of duPont's market control; and duPont has at all times competed with other cellophane producers and manufacturers of other flexible packaging materials in all aspects of its cellophane business.

839

The record establishes cellulose caps and bands are closures which are functionally interchangeable with numerous other closures sold at same time to same customers for same purpose at competitive prices; there is no cap and band market distinct and separate from the market for closures; the market for closures is a relevant market for determining the nature and extent of duPont's market control; and duPont has competed with other producers of caps and bands and manufacturers of other closures in aspects of its cap and band business.

840

The record establishes duPont has not achieved market control or monopoly power as to trade and commerce in cellophane nor attempted to achieve or to exert such power.

841

The record establishes duPont has not achieved market control or monopoly power as to trade and commerce in caps and bands nor attempted to achieve or exert such power.

842

Allegations of paragraphs 21, 22, 23 and 44 of the complaint are not supported by proof or the weight of evidence.

843

The record establishes duPont did not intend and does not now intend to monopolize trade and commerce in cellophane or in caps and bands.

1695

844

The record establishes agreements between duPont and various French interests under which duPont entered the cellophane business and received licenses for the French cellophane process did not restrain trade.

845

The record establishes various technical exchange and licensing agreements between duPont and Kalle, BCL and CIL did not unreasonably restrain trade.

846

The record establishes the various technical exchange agreements relative to caps and bands entered into between duPont and Viscose Francaise and VDC did not unreasonably restrain trade.

847

The record establishes the moistureproof patent license agreement of 1933 between duPont and Sylvania did not restrain trade.

848

The record establishes duPont did not fix cellophane prices by agreement with anyone.

849

For the purpose of this litigation, all claims of cellophane and cap or band patents obtained by duPont or licensed or assigned to it have not been shown other than to be valid.

1696

850

DuPont's moistureproof product patent 1,737,187 gave duPont lawful right throughout the life of the patent to exclude others

from the manufacture or sale of moistureproof cellophane in the United States.

851

DuPont's four original composition and process patents 1,826,696–1,826,699 gave duPont lawful right to forbid others to manufacture moistureproof cellophane in the United States by use of compositions or processes claimed in the patents.

852

The record establishes duPont's prices did not discriminate against any particular customer or group of customers and the different prices charged different customers did not have purpose or effect of suppressing or restraining competition between producers or between distributors or purchasers.

853

The record establishes duPont did not suppress competition of any existing or potential competitor.

854

The record establishes duPont's position as a manufacturer of cellophane resulted from lawful business conduct undertaken for legitimate motives and not from any restraint of trade or predatory practice pleaded in the complaint or claimed by plaintiff at trial.

1697 *Resumption of the Opinion*

I recognized through trial the principal issue is whether duPont's position gives it market control, and hence monopoly power arbitrarily to raise prices and to exclude competitors. The complaint charges duPont "has had for many years past virtually absolute control of the markets in the United States for cellophane" and such market control has resulted in monopoly powers that have "become self-sustaining and self-perpetuating". The complaint describes these powers in detail. They were, moreover, epitomized by the Supreme Court in American Tobacco Co. v. United States, 328 U. S. 781, 811, where it said:

"The authorities support the view that the material consideration in determining whether a monopoly exists is * * * that power exists to raise prices or to exclude competition when it is desired to do so." See also Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 52, and United States v. Griffith, 334

U. S. 100, 107. Throughout trial duPont had proof establishing absence of these powers.

The determination, here, depends upon an analysis of the "particular circumstances of the industry" and the "economic realities of the market situation".

Thus master factual questions are presented:

1. Does duPont have power, without regard to competitive forces, to raise price of cellophane either directly or by limiting production, deteriorating quality, or by any other means?

2. Does duPont have power alone to exclude competition in the production and sale of cellophane?

While plaintiff recognizes these are tests which govern the decision, it is in error in assuming the mere statement of these tests leads to a judgment in plaintiff's favor. The controversy begins, rather than ends, with a definition of the monopoly powers which must be proved.

1698 Throughout trial, plaintiff has offered no guides for determining whether market control and the resulting monopoly powers are in fact present. It says little as to what these powers actually are.

Monopoly power can be distinguished from the normal freedom of business only in degree. Nothing except death is an absolute. Plaintiff cannot rest on a showing duPont makes cellophane and has some degree of control over its sales, production and prices. Cf. United States v. Columbia Steel Co., 334 U. S. 495; United States v. Aluminum Co. of America, S. D. N. Y., 91 F. Supp. 333, 346.

Many sellers have some freedom over their price, production and general business conduct. Each must make his best guess of his future requirements; he must set price at which he will attempt to sell; and he may raise price if costs or other factors dictate. Such business decisions do not represent degree of control over prices or production which constitutes monopoly power. Prohibited degree of control is that which permits disregard for competitive factors. There is nothing in the decided cases which limits evidence that may be considered by a court in deciding whether these powers exist or do not exist.

Plaintiff avoids an analysis of evidence by seeking to confine it in accordance with its theoretical assumptions. It would limit discussion to a part of proof in order to prevent consideration of many competitive facts which are essential to a resolution of the issue. Decisions say this cannot be done. No fact standing alone can determine whether monopoly power exists. All facts and circumstances relating to manufacture and sale of a product claimed to be monopolized must be considered, and facts of each case are different.

Defendant contends plaintiff fails to present evidence to show cellophane is a distinct part of trade and commerce within the meaning of the statute. Plaintiff insists cellulose caps and bands are a different part of trade and commerce from cellophane.

1699 There are other products more similar to moistureproof than is plain cellophane, which are sold at the same time, for the same purposes, to the same classes of customer as moistureproof cellophane and are functionally interchangeable. Plaintiff insists these products are to be considered as a separate "part" of trade or commerce. None of the decisions on which it relies presents precise tests for resolving this issue, which is admittedly a difficult and somewhat novel one.

There is a recognition by plaintiff the issues cannot be decided by percentages alone and ultimate tests in determining monopolization are the existence of power to control price and power to exclude competition. We have to go directly to the issue by determining what facts are to be taken into consideration in adjudicating the issues of monopoly power.

Whether cellophane itself, or plain cellophane, or moistureproof cellophane, or colored cellophane, be "parts" or merely some of several products constituting a "part", the controlling question is whether duPont possesses the requisite monopoly powers over price and competition. This is not a case concerned with an explicit charged exclusion, or monopoly in a particular section of the country, such as would make the "part" issue crucial to the final judgmenent. Here, the decision of the charge in the complaint rests on existence or nonexistence of monopoly powers. The cases on which the United States relies were argued to the court and it ruled all competitive facts should be shown. Even plaintiff concedes the issues must be determined by economic realities.[1714]

1700 Need for market analysis is the teaching of every major monopoly power case since Judge Hand's Alcoa decision.[1715] United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416. § 2 cases teach weight to be given to various statistical or other appraisals of a company's business can only be made when rele-

[1714] For example, plaintiff's statement in one of its briefs is pertinent (Brief p. 81): "The structure, nature, and detailed workings of the market place must be researched and the pertinent facts, attendant thereupon, must be garnered from the entire record of the trial proceedings. Only in this manner is it possible to isolate the constituent influences of market control, so that a judgment may be rendered as to whether or not the defendant possesses that degree of influence over prices and over the entry of competitors, which is necessary to bring it within the policy interdictions of the Sherman Act."

[1715] See American Tobacco Co. v. United States, 328 U. S. 781; United States v. Griffith, 334 U. S. 100; Schine Chain Theatres, Inc. v. United States, 334 U. S. 110; United States v. Paramount Pictures, Inc., 334 U. S. 131, 167–175; United States v. Columbia Steel Co., 334 U. S. 495; United States v. Paramount Pictures, Inc., S. D. N. Y. 1949, 85 F. Supp. 881; United States v. Aluminum Co. of America, S. D. N. Y. 1950, 91 F. Supp. 333; cf. United States v. General Electric Co., S. D. N. Y. 1948, 80 F. Supp. 989; United States v. General Electric Co., D. N. J., 1949, 82 F. Supp. 753.

vant competitive factors are known. Thus, in United States v. Columbia Steel Co., 334 U. S. 495, where the issue involved was the propriety under the Sherman Act of the United States Steel Company's acquisition of the Consolidated Steel Corporation, the Court stated that: "the relative effect of percentage command of a market varies with the setting in which that factor is placed" (p. 528). The Government had recognized in its brief in the Supreme Court that "products performing the same functions but differing somewhat in their characteristics may be just as competitive as products which are identical." And, while the Court acknowledged "the difficulty of laying down a rule as to what areas or products are competitive one with another", it set out certain guides for determining the propriety of the merger which are of aid as indicating criteria to be taken into account in determining existence of monopoly power. The Court said (pp. 527–528):

"In determining what constitutes unreasonable restaint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and
1701 other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor * * *."

"Market control" or lack of "market control" are ultimate facts. They are determined by fact-finding processes, and on the basis of knowledge and analysis of all competitive factors which bear on a seller's power to raise prices, or to exclude competition. Existence of monopoly powers is not made on the basis of assumptions as to competitive markets. If the price, quantity of production and sale, and the quality of a seller's product are determined by pressures exerted on him by buyers and sellers of another's product, the products and the sellers must, for purposes of any realistic analysis, be in the same "market" and must be in competition with each other.

B. COMPETITIVE CONDITIONS PRECLUDE ACQUISITION OF MARKET CONTROL AND HENCE OF MONOPOLY POWERS OVER CELLOPHANE

Facts, in large part uncontested, demonstrate duPont cellophane is sold under such intense competitive conditions acquisition of market control or monopoly power is a practical impossibility.

i. "Market Setting"

"Market setting" in which cellophane is sold was fully developed at trial. Evidence was of a most practical type. Defendant did not rely on economic theory but rested its proof on testimony of independent businessmen engaged in various aspects of the flexible packaging business. Not a single market witness was called by the Government. Defendant presented testimony of competing manufacturers, from large and small converters, and from users of packaging materials located in different parts of the country and engaged in different lines of business. This evidence
1702 was supplemented by a market survey, by studies from trade associations, by reports of duPont's own salesmen, by physical samples of materials and wraps, by testimony of company officials concerned with competitive problems, and by reference to extensive documentation in reliable trade journals and authoritative texts. I attended in Atlantic City together with counsel for both sides the Annual Packaging Show in April 1952 to see the manner in which these materials are offered to the trade.

Market evidence is complete. Defendant has showed a detailed development of evidence to bring before me an appreciation of the intense competition existing in the flexible packaging markets, and an understanding of the business considerations which motivated duPont in the various steps it took to develop cellophane.

United States concedes there is a degree of competition between cellophane and other materials. To resolve the ultimate issue as to duPont's alleged market control and monopoly power, I must examine the nature of the competition encountered by cellophane. This inquiry cannot rely on any single fact. Ultimate conclusions as to degree of competition must be made from an appraisal of all commercial activities disclosed by the record.

Nature of market must be based upon proof. DuPont by evidence makes speculation superfluous by bringing facts of the market place to the surface. It includes identity and nature of other flexible packaging materials, analysis of uses within the trade, prices, variety of factors governing selection of one wrap over another, business conditions that vary these factors from one end use to another, character, purpose and effect of promotion and research activities of different manufacturers, thrust of advertising and trade literature, and effect of competition in actual paying customers gained, lost, divided, and shifted.

Any appraisal of this evidence must be made in the face of master facts. Proof is not looked at under a hypothetical set of conditions cellophane might have been a substitute for other
1703 products. It shows duPont had to break into an industry dominated by other products, particularly waxed paper

and glassine, which were sold in larger volumes and at lower prices. These materials were, in the 20's, and still are, manufactured and converted in quantity by large concerns. The question facing duPont was whether cellophane could substitute for them in uses where they were well entrenched. Proof deals with continuing intense competition for specific orders, with never ending interchanging of materials as the normal and characteristic experience.

The point is there are no final victories in competition. Every purchaser is back on the market in a matter of months or weeks with new requirements, and necessity of making a new selection. This means a purchaser's choice is frequent. In these circumstances, customers retain freedom of choice, and exercise it frequently.

Proof shows competion to be increasing, not decreasing. Packaging business has grown in volume with advent of the supermarket and self-service retailing. The years since World War II have witnessed a striking increase in packaging of consumer units for sale in these supermarkets. New techniques of processing flexible packaging materials have been developed by manufacturers and converters. New materials have appeared on the market, adding to variety; and stimulating established producers to match newer products. Competition is increasing, in the volume of business, the number and variety of producers competing for this business and the range of properties which a purchaser may obtain.

There are over one hundred varieties of cellophane, dozens of varieties of glassine, and diversified types of waxed paper, aluminum foil, cellulose acetate and other wraps. Variety is the result of effort to please everybody. Not only is every material offered by its seller in a maximum of types, but there is wide range of price among different types. Prices and types are further refined
by converters whose particular business is to employ their
1704 technical skills to tailor a package to their customer's product by blending materials, applying a variety of inks and designs and pricing accordingly. The result of this variety is a graduated spectrum of physical properties and prices from which a purchaser may select combination of quality and economy that appeals to him. Products of each manufacturer appear in many places on this spectrum, across its whole range, and the measure of success is the number of individual solutions each seller can provide.

Best combination of properties and of cost is what buyers seek. Buyers purchasing for the same use, may make different appraisals of the same combination, for selection is far from a scientific process. Selection represents best efforts of buyer to arrive at a judgment of composite of properties and to balance his cost against it,

in the light of competitive conditions existing in his own business at the time.

This range of properties and price is the product of competitive influences in the market: of technical advances of manufacturers, of efforts to widen market and reduce prices; and of arrival on the scene of new packaging materials.

Qualities and prices offered by duPont and competitive producers of flexible packaging materials must satisfy their purchasers. General Foods, Armour, Swift, E. J. Brach, Curtiss Candy Company, Ward Baking Company, cigarette companies, A & P, Kraft Foods and others are among the group. They are cost-conscious. They are sensitive to economies offered by sellers of packaging materials. They have technical expertness in mechanized packaging, and they require packaging materials of standards of quality to run on high speed production lines and to be, in packaged form, a credit to their products. They have laboratories where packaging materials are subjected to scrutiny for deficiencies. Similarly, converters, operating high speed presses and bag machines, require packaging materials that will be-
1705 have uniformly on machines, and provide a quality package. for the converter's customer. Defendant sells to these purchasers. Standards and requirements of these purchasers control.

Evidence shows working of these facts of competition. Evidence at trial disclosed there is an established trade press and literature which covers all types of packaging and lays bare every advantage in one material or another. Manufacturers of flexible materials have sales organizations calling on the same customers and classes of customers. In addition, numerous converters of flexible packaging materials employ hundreds of salesmen calling on users. They offer their know-how in justifying best possible material for a specific purpose of a specific buyer at the particular time. They make available their skills in processing many different types and providing new combinations of materials. Competitive pressures which are generated by this group are of significance in intensifying the interest of each manufacturer in providing better service, lowering cost and improving quality.

Independent concerns manufacture different types of flexible packaging materials. Many of these have been in business for a long time. The record shows their business has grown. There is no evidence any one has been forced by duPont's competition to withdraw from participation in the flexible packaging business. Similarly, the number of converters handling various types of flexible packaging materials has increased. There are today three manufacturers of cellophane with plants located in the United States. The two other companies, American Viscose and Olin, are not in any way restricted by agreements with duPont. Both

concerns are expanding and each has substantial resources. DuPont's percentage of cellophane production is declining and accounts for less than 20 per cent of the flexible packaging market.

In this, as in all competition, the customer's order is the pay-off.

The evidence deals with the end result of competition, and
1706 disposes of plaintiff's contention cellophane has its own narrow market within the flexible packaging field.

Proof shows preoccupation of duPont executives with price advantages of waxed paper and glassine and with technical advances in these and other flexible packaging materials. Proof documents numerous occasions on which duPont cellophane price reductions and technical developments were made necessary by the advantages of other products.

Shifts of business have been proved. It has been proved in every major end use; duPont cellophane has lost and gained actual paying customers, as a result of cost and quality judgments by these customers. It has been proved these gains and losses are substantial.

ii. Candy—A Case History

To show competition, actual histories of duPont's competitive effort in each major end use are documented by the record. Packaging in the candy industry may be used as an example to show working of competitive factors.

One of the earliest uses for duPont cellophane was wrapping of boxed chocolates, and duPont's first big customer was an account in this field, Stephen F. Whitman, which, in December, 1924, "is now putting up about 40% of their packages in cellophane". This was plain cellophane, wrapped by hand and purchased at over $2.50 a pound. This type of business provided little volume.

DuPont realized its sales were too small and its cost too high, looked to other parts of the candy industry for additional business to increase its volume. Candy was comprised of cheaper boxed goods, lollipops, plastic candy, caramels, which were packaged in waxed paper or glassine or unpackaged. Waxed paper and glassine were then selling at a fraction of the price of cellophane, offered satisfactory moisture resistance qualities and could easily be used on wrapping machines. These were serious competitive obstacles.

1707 Price problem was the principal block to expansion of sales, and duPont addressed itself to this problem. In 1924 Yerkes presented the case in these terms:

"I am in favor of lowering the prices. I think we are taking a chance on whether we are going to increase volume sufficient to make up the difference, but my feeling is that a substantial reduc-

tion in price should be made. Think it will undoubtedly increase sales and widen distribution. Inclined to think it will increase distribution in candy trade. The Whitman Company is now putting up about 40% of their packages in cellophane. I really do believe that a reduction of say 25% would widen distribution and increase sales to present customers. Our price I think is too high based purely on manufacturing cost, and too high in comparison with other wrapping papers on the market, and while we cannot approach the price of glassine or other oil papers, if we make a substantial reduction we will in some cases get somewhere near them."

With reduction in price differential between cellophane and waxed paper and glassine, duPont's business in the candy industry did, as predicted by Yerkes, increase. In 1925, over $357,000 worth was sold to the candy industry, and over $445,000 worth in the following year. A contemporary report to the Board of duPont by Yerkes shows some new candy uses had been tapped:

"The use of Cellophane continues satisfactory in this industry.

"The use of Cellophane for small bar candies has increased and we are continuing our work in this direction.

"Some of the larger operators have started to wrap a cheaper grade of boxed candy which has not heretofore been wrapped.

"This industry is well posted on the advantages of Cellophane and each price reduction we make opens up new opportunities in wrapping lower priced goods and small units."

1708 Lack of moistureproofness in cellophane was the next major block to larger volume sales. Subsequent invention of moistureproof cellophane was a factor in development of large volume sales.

In the 1930's duPont began an extensive effort to develop packaging of candy bars, the largest volume candy item in the market. Cost of cellophane again was the main obstacle to this effort, and initially the attitude of the trade was that encountered at the Mars Company:

"1—Mars' attitude at first was very cold, and he said he would have to buy printed Cellophane as cheaply as he could printed glassine before he would consider it.

* * * * *

"His present attitude is simply what Long said it was. He states he cannot increase cost of wrapper without either taking it out of the quality of the bar, or making the bar smaller, and he is willing to do neither. He also stated he does not intend to decrease his unit profit for a sales increase, which would be indefinite—stating that Curtiss and Schutter Johnson both tried selling bars without a profit and then said 'and look at the fix they are in'".

In spite of this, several of the nationally known brands adopted the cellophane wrapper. Contemporary trade reports show that "Baby Ruth" bars, "Butterfingers", "By Jiminey", "Oh Henry", "Oh Honey" and "Rosio" bars all appeared in cellophane wrappers. This adoption of cellophane was "the belief that the cellophane dress-up would have a sales appeal and a sales advantage", which would offset its higher cost.

Cellophane was not able to hold competitive victory over glassine in this important field. 1933 saw beginning of the reaction:

"They have decided to discontinue the use of transparent sheeting on their Old Nick and other chocolate bars." (DX 77, p. 174, 9/18/33).

1709 "Within one to two years Curtiss shifted back to a glassine outer wrapper at the insistence of the Sales Division, because the wrapper, particularly in the case of Baby Ruth Bars, had become so well associated with the bar that customers and retailers complained of the change." (Jakes, DX 1006, p. 2).

Retreat became general, the basic reason being the bar manufacturers,

"when they added up the situation at the end of a year and a half or two years their profit position was not as good as it had been when they were using glassine; so they went back to glassine."

Since change of fortune in the candy bar trade duPont has been chipping against cost advantage of glassine, gaining an account here and losing an account there. Situation was summed up by a duPont sales bulletin in 1937:

"As pointed out at the recent annual meetings, while our total business in the candy industry has shown an increase, we have lost ground on 5¢ and 10¢ bars. The discontinuance of transparent wrapping on certain candy bars seems to be principally due to:

"1. Rising ingredient costs (as pointed out in Bulletin 8-MM) forcing the manufacturer to trim expenses elsewhere—and packaging has been the target.

"2. Intensive selling efforts on the part of the foil and glassine manufacturers.

"This seems to be a situation where, in our effort to stimulate individual candy wraps, we have slackened off our attack on bars, setting the stage for inroads by selling campaigns of other types of wraps. We now have the job of stopping these inroads and striking back in a positive manner."

In 1940 Peter Paul Company, a large candy manufacturer, discontinued cellophane on one of their bars because of "high
1710 cost of manufacture due to milk chocolate and almond prices; either had to reduce size or go into Glassine". Six months later the same bar manufacturer dropped cellophane

from another of his bar line "replacing it with glassine which they will print themselves * * * this is due to rise in material costs of Mounds—saving of 25¢ per M wrappers at approx. $36,000 per year". Thus lower price of competing wrapping materials continued to be an obstacle.

"Blomquist gave little encouragement based on additional costs. He contends any additional expenditure should go into the quality of the bar itself".

DuPont hung onto business in the bar field in spite of cost disadvantage:

"Unprinted cellophane, foil and glassine are used interchangeably as the primary chocolate bar wrap, under a printed paper wrapper, in amounts depending upon the available supply of aluminum foil and cellophane."

From the salesmen's view, competition with glassine on candy bars remains lively. Smith testified:

"Q. Do you have any bar business today, or have you lost it all?

"A. No. No, we have what I consider to be a very nice bar business.

"Q. I am talking about bar business apart from this packaging of groups of bars. I am talking about business in the individual wrap. You have some of that, you say?

"A. Yes, we do. We have a very nice business in that respect, which I should certainly hate to lose. We have a very nice number that is nationally distributed, made by the Elmer Candy Company of New Orleans. I think they call it Golden Nougat. We have an account in Kansas City that comes to my mind, the Donaldson Chocolate Company that just on one item uses a very substantial amount of cellophane.

1711 "Q. In those cases where you have the business, are manufacturers of glassine calling on those accounts?

"A. Yes, they are. As a matter of fact, we replaced the glassine on the bars of the Donald Chocolate Company not too long ago with printed cellophane, at a higher cost."

Competition with Sylvania on basis of price and quality followed much the pattern as between duPont cellophane and other materials. On occasions duPont encountered "inside prices" of Sylvania. Case lot prices for split shipments were given by Sylvania to the Nunnally Company and Brock Candy Company, though Sylvania only doing this for preferred accounts." In such cases the report duPont salesmen could make would be "assured me a good share, or all of his business, at such time when he is no longer able to secure the above concessions."

Evidence disclosses competition in the case of other types of candy as well. As price disadvantage of cellophane decreased, duPont looked for a greater volume of sales in penny goods, hard

candies, lollipops and plastic types of candy such as caramels, kisses, taffy, etc. Here, glassine and waxed papers were used as wraps in these fields. These candies were wrapped by machine in great volume, at low unit cost, and sold at low prices. Hand wrapping was impossible on such priced goods, so duPont undertook to develop means for converting existing candy wrapping machines to cellophane, carrying out an effort to interest machinery manufacturers in machines to handle waxed paper, cellophane and glassine interchangeably. By 1935, increased cellophane sales made possible by widespread mechanical wrapping with cellophane in the candy business was "already running into very large tonnage." Cellophane sales to the candy industry for the year 1935 were nearly 2½ million pounds. 1936 showed a 10% increase.

DuPont was selling moistureproof heat-sealing cellophane to the candy industry, and discovered one type of film did not perform uniformly on different types of candy. Some
1712 candy required protection against moisture transfer, some types of candy had more or less sugar content than others, and some were made and wrapped while hot—others when cold. It was clear more tailoring of different types of film had to be done to provide a satisfactory wrap for variety of candy products.

By 1939:

"A special film had been developed and is now available for wrapping sticky plastic types of candy.

"Our regular MT and MST films are being used successfully by many customers for this purpose, but in the case of certain types of candy have not been entirely satisfactory due to sticking of the film to the product.

"This refers particularly to the grades of caramels with low butter-fat content, kisses, taffy, etc.

* * * * *

"More important, however, is the opportunity for new business—particularly on kisses and taffy where we have never had an entirely satisfactory film."

In 1948, types of duPont cellophane for candy included MT–36, MST–51, MT–35, MST–53, MST–54, MST–56 for sticky candy, cold hard candy, hot hard candy, lollipops, lozenges and marshmallows.

Waxed paper and glassine made similar quality improvements to hold their position in the trade.

"The quality of printing on waxed paper has been quite improved and there has been a decided improvement in opacity as a background for printing. Glassine in the last fifteen or twenty

years has improved in tensile strength, opacity, finish and ability to take printing * * * The improvements in wax paper and glassine have affected their acceptability to Curtiss as packaging mediums and caused Curtiss to continue using them."

* * * * *

1713. "Waxed paper has been improved because cellophane was being sold for uses formerly served by waxed paper, in order to win back a position in those same uses. The waxed paper industry could see the inroads that new products, such as cellophane, Pliofilm, other transparent materials and glassine, might make into waxed paper sales. The improvements were made to maintain waxed paper's volume of sales. These recent improvements in waxed paper include greater opacity, superior coatings and progressive advancement in reproduction and printing, and they helped waxed paper maintain its volume".

* * * * *

"You've got waxed paper which, when you look at a sheet that is manufactured today as against something that was manufactured ten or twenty years ago there is a terrific improvement. It is shinier, it is glossier.

"It used to be that waxed paper was sticky, but now it is nice and hard and has a glossy surface and looks clean and sparkling"

* * * * *

"We can make more transparent, we can make stronger papers than we did then, a greater variety of papers to meet different requirements. Our laminations are much more moistureproof, our coatings are more varied, and we are doing a lot more work in these combination jobs of combining glassine with other materials, foils or films or whatever and working with other people who do the same thing."

These quality improvements have been forced upon manufacturers of flexible packaging materials by critical customers, including candy manufacturers, equipped with laboratory and testing facilities to discern deficiencies in available materials. Examples of this are Kraft's Glen View Laboratory demands and standards for wrapping material.

1714. Competition between flexible packaging materials for packaging in the candy industry has revolved about competition in price, and competition in the qualities each may offer to the trade. Result of this competition has been to produce a fluid group of customers, for whose trade the different flexible packaging materials vie. From duPont's point of view "We are still continuing, however, to try to get that individual bar business."

Advertisements directed to candy trade point out "Four of the six largest makers of chocolate bars buy Riegel Papers regularly"; or "Trix are fresher, crisper in Pliofilm"; or Riegel's Diafane has "proven practical in many fields" including candy bars; or "Our machines are making packages with practically every known form of packaging material—plain Cellophane, printed Cellophane, printed paper wrappers, glassine, foil, etc."

Losses of business to Sylvania cellophane for candy packaging reached substantial volume, 20,000 pounds in six months on a single chewing gum account, and 170,000 pounds in 1934 on a total of 22 candy accounts, as examples from but a single year. Other examples of shifts working both ways are: a shift of Kraft Foods Company to Sylvania; Wilcox, and partial shifts in the cases of Schutter Johnson, Peter Paul and Planter's.

DuPont's sales to the candy industry grew from $357,893, or about 185,750 pounds at the average price for the period, in 1925 to 17 million pounds in 1949 and 20 million pounds (including gum) in 1951. But percentage of candy industry's output packaged in cellophane has actually decreased from 46% (for all cellophane) in 1931, to an estimated 25% (for duPont cellophane) at the present time.

Strength of this competition continues. Recent replies by 150 candy manufacturers to an industrial questionnaire disclosed while these manufacturers used over 7 million pounds of cellophane, this represented but 24.4% of their use of three principal flexible
1715 packaging materials, and even a lesser percent when other materials were taken into account. Glassine and waxed paper accounted for more than three times the volume of cellophane.

iii. Testimony of Independent Witnesses

Testimony of independent witnesses discloses evidence of competition.

The Sales Director for Films of Celanese Corporation of America, the largest manufacturer of cellulose acetate, testified on competition, and his deposition is summarized on this point:

"Mr. Hopping knew of no packaging use for CA (Celulose Acetate) film of which cellophane does not have a part of the market (38). Celanese has 'always aimed at cellophane' in its marketing and in its pricing, and CA's 'major competition is cellophane' (12, 13." (Hopping, DX 1007, p. 20).

The Production Manager for Foil of Aluminum Company of America:

"Foil competes with glassine for some end uses, particularly chocolate bars now in glassine that in many instances were formerly wrapped in foil. Foil competes with cellophane, cellulose acetate, pliofilm and vegetable parchment" (Torrence, DX 1009, p. 42).

Manager of Films for the Goodyear Tire and Rubber Company, only producer of Pliofilm:

"Competition with other packaging materials is met primarily as follows * * * cellophane for most uses, one of the largest being self-service meats* * *" (Ellies, DX 1014, p. 136).

Vice President of Nashua Gummed and Coated Paper Company, producers of waxed paper and substantial converters of cellophane, glassine, Pliofilm, etc., testified on competition between cellophane and a number of materials handled by his company (Ramsay, DX 1017, pp. 229, 230):

1716 "Cellophane competes with other flexible packaging materials sold by Nashua, and also competes with other packaging materials that Nashua does not produce.

"From their point of view the end uses for cellophane are not separate and distinct from the end uses of other flexible packaging materials. Similarly, the customers and prospective customers for cellophane are not separate and distinct groups from the customers for other packaging materials."

Vice President of Rhinelander, one of largest glassine producers in the world (Nelson, DX 1020, p. 304):

"Cellophane is the product with which Rhinelander's products compete most directly and is Rhinelander's most annoying competitor."

Testimony of Vice President for Marketing of the Marathon Corporation, one of the largest producers and converters of waxed paper, corroborates the testimony of Ramsay of Nashua Gummed & Coated Paper Company (Croy, DX 1021, p. 345):

"Wax paper and cellophane compete with each other and are offered to the same trade."

Each of the above excerpts from the evidence are from summaries of depositions. Following quotas at length from verbatim testimony of Frederick S. Leinbach of the Riegel Paper Corporation (Leinbach, Tr. 6767–6768):

"Q. Now, you said these uses that you exemplified by physical samples were illustrative. Would you give us in your judgment some of the end uses in which you find the competition from cellophane most intense?

"A. There is a terrific competition now going on in bread in the bake field, cakes, and as I mentioned before, potato chips; the snack specialty field, of which Fritos (indicating) are an example.

It is all the time in a state of flux; we lose them, we get them
1717 back. The same thing happens with cellophane. Frankly,
(6768) almost any one of these barrier jobs here is a competing point, as you see. Even in cereal we have to compete with a cellophane because a fellow can put his stuff up in a duplex cellophane bag or a waxed paper barrier of some sort. It is a choice he has to make.

"Q. Does glassine have complete dominance of end use to the exclusion of all other flexible packaging materials?

"A. No, sir, I wish it did.

"Q. Now, in your sales planning, to what extent do you find that people who are using cellophane for packaging are the actual or prospective customers for your papers?

* * * * *

"The Witness: The people who use cellophane are excellent prospects for our papers, because the reasons that they would use cellophane in my opinion resolve into qualities which we can furnish in our material."

Character of the flexible packaging markets, measured by proof, establish duPont as a manufacturer of cellophane does not have market control or monopoly power.

C. DUPONT HAS NOT "POWER TO RAISE CELLOPHANE PRICES"

Power arbitrarily to raise prices is principal indicium of monopoly power and market control. This is the test to be applied in adjudicating monopolization. Under market conditions which have prevailed, duPont does not possess power to raise cellophane prices without regard for competitive pressures. The market would penalize any attempt to do so with lower sales and smaller profits.

Cellophane has been sold at price disadvantage. It costs more per square inch than wax paper and glassine, the two principal packaging materials which dominated the flexible packaging markets at the time cellophane was introduced and still dominate these markets today. Buyers of flexible packaging materials are
1718 shown by evidence to consider the relative composite properties of cellophane and these other materials in the light of their respective prices. Cellophane has few, if any, end uses where wax paper and glassine are not also sold.

DuPont could not have developed volume of cellophane business without lowering its prices. It was only as duPont lowered price and narrowed relative spread between cellophane prices and the prices of these other materials that it was accepted for end uses where wax paper and glassine were established. Only by reduction of price has cellophane been able to achieve an appre-

ciable volume of sales in competition with other packaging materials.

Evidence shows a degree of price sensitivity in the flexible packaging markets. This is reflected both statistically and in terms of concrete experience with specific accounts.

DuPont's sales grew whenever spread between prices of cellophane and other materials narrowed. This relative price relationship was presented by graphs. From these, it shows gap between moistureproof cellophane prices and glassine prices and between moistureproof cellophane prices and waxed paper prices sharply diminished in the period from 1929–1949. In January 1929 price of moistureproof cellophane was seven times that of glassine. In June 1934 it was 4½ times price of waxed paper and 3¾ times price of glassine. By January 1949, moistureproof cellophane prices were only twice those of waxed paper and a little more than twice those of glassine. In 1948 and 1949 gap between moistureproof cellophane and waxed paper and glassine prices was the smallest in the 20 years of moistureproof cellophane history. Graphs show duPont's productive proportion of flexible packaging materials increased as gap between prices for cellophane and glassine and waxed paper narrowed.

Experience in markets further illustrates degree of price sensitivity, and absence of power in duPont to control price.

1719 By annotations to certain of its proposed findings, duPont called my attention to specific examples of business lost or gained as a result of price. The record shows duPont was unable to sell a particular account or retain the business of a particular account due to price. It disclosed as prices were reduced, business became available to duPont which it could not obtain at higher prices. The pull and tug of price competition in the market was emphasized by many witnesses and shown to permeate the entire market, both geographically by category and type of account. Large accounts, as well as small, responded to price changes.

There is no cellophane, glassine or wax paper price, nor is there a clear-cut margin between cellophane prices and prices of other materials. There are many types of duPont cellophane, selling at prices from $.45 per lb. to $.85. Each has properties and qualities different from other types. Each type represents a particular price—multiplied by varying opinions and appraisals of combination by buyers, each of whom makes an individual appraisal in the light of his specific package needs and the economics of his business.

Glassine, for example, demonstrate this. Rhinelander lists over 30 varieties of glassine, from $.235 per lb. to $.475 ($23.50 to $47.50 per cwt.). Each is different in weight, transparency

(super-transparent to opaque), in form of coating or lamination, heat-sealing and moistureproof properties.

Variations in price occur as materials are printed, laminated, or processed into wraps designed to meet specific packaging uses. This produces a closely-packed range of price-quality values, with much overlapping and duplication, with multiplicity of choices, for each buyer who wants certain price-quality combinations. Here, duPont is forced, as a matter of business judgment, to be bound by wishes of its critical customers.

Character of this price competition is emphasized by evi-
1720 dence of quality competition. It is recognized throughout the period of cellophane development. Evidence discloses these quality improvements affected duPont's ability to sell. In instances where its quality was inferior, it lost business. In instances where its quality was superior, it gained business. The record shows examples of shifts of business due to quality.

Willingness of buyers to switch rapidly from one wrapping material to another has been demonstrated. The nature of products, organization of market, its requirements, its growth, behavior of buyers and sellers in the market, nature of buyers' demands and other factors all point in the direction of degree of price and quality sensitivity and, hence, competition to which duPont's cellophane prices must be responsive.

Greater responsiveness of the market to small price changes or small quality changes, the greater is the pressure on the seller, and the less control he can exert. Great sensitivity of customers in the flexible packaging markets to price or quality changes, in final analysis reflects the fact these customers have adequate alternatives to purchasing from duPont. Price sensitivity of these customers is a reason why duPont's control over its prices is not such as to give it monopoly power. Competitive influences in the flexible packaging markets, place limitations upon duPont's pricing policies and procedures. They force reduction of duPont's prices and deny it power to raise prices in the manner of a monopolist.

Cellophane prices have become competitive with glassine and wax paper. This was made possible by price reduction—not increases. The arbitrary power to raise price has not been evidenced in the history of duPont's cellophane business.

Plaintiff was not able to advance convincing evidence power to raise prices exists. It rested on the single fact duPont is the "dominant"—the largest—supplier of cellophane. As to this, power over price cannot be shown by economic theory nor
1721 by mere assertion. United States v. United States Steel Corp., 251 U. S. 417, 448–449. Proof of dominant position

in the supply of a particular product is not, in law, proof of monopoly power over price. United States v. United States Steel Corp., supra; United States v. Columbia Steel Co., 334 U. S. 495. Judge Knox stated in United States v. Aluminum Company of America, 91 F. Supp. 333, 346:

"The conclusion is inescapable, from the Columbia Steel decision, that the possession of monopoly power is something other than the status in a market of a dominant firm. The dominant firm may have neither the power to exclude competitors, nor the power to fix prices." Again, in the first Aluminum case Judge Hand found long-range supply of secondary aluminum, which would have been a competitive factor in the market, was controlled in the first instance by Alcoa itself, and the amount of imports was controlled by the price set by Alcoa, rather than Alcoa's price being controlled by imported ingot. (See, 148 F. 2d at 424–426). But, in the second Aluminum case, and this has master significance, despite a showing Alcoa still supplied from 85 to 90% of the primary aluminum sold by domestic producers (91 F. Supp. at 356), Judge Knox found the Government failed to establish price domination in the market by Alcoa because the degree of participation by Alcoa's two competitors was a matter within their control rather than in that of Alcoa. (91 F. Supp. at 364–365).

Power in a seller must be measured by degree of power in other sellers, over their own actions, and by the effect of that power on the actions of seller under attack. If prices set by others who supply different types of flexible packaging materials determine duPont's price, then to that degree duPont does not have monopoly power.

There is no evidence of collusion here to fix prices but evidence shows the price identity occurred as a result of competitive factors. Sylvania, duPont's competitor, was obliged to charge prices comparable to duPont in order to remain competitive, since
1722 its quality was inferior. Evidence shows where Sylvania's prices were higher under distribution conditions, it could not retain the business. Thus, Sylvania followed duDont but this adherence to duPont's prices does not prove any monopoly power in duPont.

The prices duPont charged were prices which it was obliged to charge as a result of the competitive conditions in the market.

The Government argues duPont's power to control prices is evidenced by its profits, and duPont was able to achieve predetermined rates of return. Plaintiff's own proposed findings, however, disclose rates of return varied substantially from year to year. There is no evidence as to rate of return earned by any other manufacturer of flexible packaging materials, such as waxed

paper or glassine. Evidence did show duPont's rates of return were somewhat higher than Sylvania's, but this resulted from duPont's superior efficiency. Years of profit do not establish monopoly power over prices. They establish this: duPont was an efficient business company.

Monopoly cases do not rest on such insubstantial evidence to support complete power over price. In the Aluminum case, Alcoa was proved to have controlled competition in the fabrication stages of the industry by means of a "price squeeze" in which Alcoa, as the sole supplier of ingot, set price of ingot to independent fabricators so high those fabricators could not successfully compete with Alcoa in the fabricated products made in its integrated fabrication plants. (148 F. 2d at 436–438). In the Reading cases, there was proof of control over competition and prices in the sale of coal by means of the acquisition of the only means of transportation from the fields to the New York market, and by means of the so-called 65% contracts, which tied the price of independent producers forced to use the defendant's railroad to the price set by the defendant in the New York market. United States v. Reading Co., 226 U. S. 324; United States v. Read-
1723 ing Co., 253 U. S. 26. Other cases showed prices remained unchanged despite drastic economic changes and business pressures: see United States v. Trenton Potteries Co., 273 U. S. 392, 397–8; United States v. Sōcony-Vacuum Oil Co., 310 U. S. 150, 221; that prices were with intent manipulated to exclude competitors, often by concerted action, United States v. Corn Products Refining Co., 234 F. 964, 985–994, app. dis. 249 U. S. 621; and American Tobacco Co. v. United States, 328 U. S. 781, 806–7; that prices have been raised at the height of a depression in direct disregard for the economic tide of the times, American Tobacco Co. v. United States, 328 U. S. at 804–6; or that control of resale and other distribution prices existed, American Tobacco Co. v. United States, 328 U. S. at 807–8.

In contrast with proofs in other cases showing arbitrary exercise of power to control price, there exists in this case evidence duPont's prices were lowered over a period of many years; these prices were set independently of anyone else and in response to competitive influences; strong independent sellers existed in the market whose price policies placed limitations on duPont's own price freedom; duPont exercised no control over resale or distribution prices; it never raised prices for the purpose of squeezing out competitors in the manner of Alcoa, or manipulated prices in other ways to exclude competition. DuPont's prices have been competitive as the gap between cellophane and glassine and waxed paper prices narrowed.

D. DUPONT HAS NOT THE "POWER TO EXCLUDE COMPETITION"

1. General

There is no contention duPont has power to exclude competitors from entering the flexible packaging markets. DuPont has but a single position in the manufacture of any material other than cellophane and has no control over any patent, raw material or other resource which would inhibit entry of other companies into the manufacture of the many different types of materials which are sold in the package market. Its position in
1724 the flexible packaging market amounted in 1949 to less than 20% of consumed materials.

Plaintiff contends duPont has power to exclude competitors from the manufacture of this product.

There is no proof duPont has any corner on raw materials necessary for manufacture of cellophane. Evidence shows there are qualified suppliers of wood pulp for cellophane viscose manufacturers who are ready to supply the trade. None of these suppliers are tied to duPont in any way by requirement contracts. No charge is made raw materials are controlled by duPont.

After a look at technology, evidence shows duPont does not own any patent which enables it to exclude others from the manufacture of cellophane. All of duPont's cellophane patents are available for leasing at reasonable royalties; evidence shows these patents will not bar others from engaging in this particular business. Evidence also discloses as to technology American Viscose and its predecessor, Sylvania, have been able to engage in the business to produce commercial quality cellophane without any technical assistance from duPont. American Viscose has a research organization and a background in the field of viscose chemistry. This is, too, the case as to Olin, which has its own technical facilities and has been engaging in important research in fields pertaining to cellophane. Apart from technical aspects, there is no proof duPont has any control over any essential piece of equipment for the manufacture of cellophane by patent, lease, contract or otherwise. The fact companies throughout the world are engaged in cellophane manufacture without any assistance from duPont, is further evidence of its lack of technological control.

As to capacity, duPont acquired no plants but built all its capacity itself. Evidence discloses no condition of over production; no idle capacity overhanging the market. In fact, duPont's expansion has been geared to anticipated demand, and evidence is, there is, if anything, need for further cellophane produc-
1725 tion when the full potentiality of the markets is examined.

Demand has fluctuated and duPont has been both oversold and undersold, swinging from one condition to the other as market factors change.

After an examination of raw materials, technology and plant capacity to distribution, there is no evidence of power to exclude competition. Evidence shows duPont has not by any device monopolized outlets of distribution or isolated any type of customer from other sources of supply. There are qualified converters. None are tied by contract to duPont. Converters handle duPont cellophane as well as the cellophane of other manufacturers. Testimony from both American Viscose and Olin establishes neither of these companies had difficulty in securing adequate converter outlets or has been subjected to restrictions in developing their converter businesses.

As to distribution, customers who purchase cellophane directly from manufacturers or from converters are in no way tied to duPont. DuPont has no control over the equipment they use to make packages. No particular group of customers deal only with duPont. Large customers and small customers are served by all producers. Many of these customers buy from more than one producer and customers shift back and forth between suppliers in response to competitive pressures.

Thus, there are not present in the cellophane business any of the orthodox indicia of monopoly which appear in monopoly cases.

2. Potential Competitors

There is no proof any existing competitor was eliminated by acquisition or activities that forced his withdrawal from competition. This case is concerned only with alleged exclusion of the threatened "potential competitors", persons whom the Paramount case spoke of as having the desire or the capacity to enter the business. United States v. Paramount Pictures, Inc., 334 U. S. 131, 152.

1726 In pretrial proceedings, plaintiff named 10 American companies as potential competitors excluded by duPont from the manufacture of cellophane. These were:

American Viscose Company	Marathon Corporation
Visking Corp.	Goodyear Tire & Rubber Co.
Rayonier, Inc.	Eastman Kodak Company
Union Carbide & Carbon Corp.	Monsanto Chemical Co.
Transparent Package Co.	Skenandoa Rayon

Plaintiff after trial does not contend the last six of these concerns were excluded potential competitors, and asks no findings

as to them. By written notice, it withdrew the charge as to Skenandoa Rayon. Plaintiff offered no evidence as to exclusion of Marathon, Goodyear, Eastman, Monsanto, or Transparent Package Co. Responsible executives of Marathon and Goodyear, called by duPont, testified their companies had at no time any desire to manufacture cellophane. My consideration is thus narrowed to Visking, Rayonier, American Viscose and Union Carbide. Proof as to each of these companies establishes none were potential competitors in the judicial language of the Paramount case and none were excluded.

As to Visking, evidence shows this concern was organized with the aid of duPont; duPont contributed essential patents, technology, capital and managerial assistance. This company was organized for the purpose of engaging in the manufacture of cellulose sausage casing, to the development of which Visking's founder had devoted his life and resources. No witness for this concern appeared. But the prime mover, and long-time president of the company, Mr. Freund, deceased at the time of the trial, spoke through a detailed letter to Judge Jerome Frank received in evidence. He wrote Judge Frank in this fashion:

"* * * it was a pleasant surprise to me to find duPont courteous, fair and cooperative. We came to an agreement
1727 and worked out a license agreement. In drawing it I can recall that it was I that made all the demands, not duPont * * *

"I have never examined the contract since the day it was signed back in 1925, nor do I think duPont have either. It was the most fortunate event in my whole life." There is no evidence Visking desired to enter the cellophane business. Even after duPont offered to license its patents and to give technical assistance to assist new concerns to enter the business, Visking did not take advantage of this oportunity. There is no evidence duPont took any action which prevented Visking from manufacturing cellophane. The license agreement between duPont and Visking put Visking into business and gave it the right to use patents and secret information which duPont had the lawful power to withhold completely.

Plaintiff's case as to exclusion of Rayonier is also without support. As to Rayonier's ability to make cellophane, the Vice President of Rayonier testified simply: "They had no knowledge of cellophane manufacture".

As for Rayonier's inclination to make cellophane, evidence shows Rayonier's entire experience and preoccupation was with pulp manufacture and

"We are still in that position and that has occupied our full time and attention and funds * * *

"Q. Can you tell me whether or not the effect of this contract was to exclude you from cellophane manufacture?

"A. We never considered it so, and it certainly did not exclude us because we were not interested in the manufacture of cellophane in any of those years."

Plaintiff's proof duPont excluded American Viscose from competitive manufacture of cellophane should be considered with the fact this company, the largest rayon manufacturer in the world, is now the second largest cellophane manufacturer in the
1728 United States, with an expansion program under way growing to a capacity of 100 million pounds.

Asked by me whether duPont ever asked Carbide not to compete, as opposed to a more formal agreement, Dr. Davidson said:

"What could they offer me? We had a very rapidly growing business in a new line of industry that no other chemical company at that time was following. Our future was a lot brighter than anything that they could offer us."

The reason why Carbide did not undertake commercial manufacture of a packaging film was, simply:

"* * * why should we take some millions of dollars and go off into a field which had some mechanical operations which we were not familiar with and in the end we might not even be able to compete. So we put our money and energy into the production of chemicals, into the enlarged production of chemicals. This was one of the most important reasons."

Only instances of alleged exclusion urged by plaintiff, then, involved four companies which are proved to have had no inclination to enter the cellophane business. In these instances, Visking, Rayonier and American Viscose, duPont was granting licenses under its patents, and alleged exclusion consisted of placing lawful and reasonable limitations on use in the licenses. In the other, alleged exclusion took the form of duPont's drawing its concededly valid moistureproof patent to the attention of a large and powerful concern (Carbide), which had no interest in making a competing product. None involved any unlawful act or unlawful intent, and none had effect on duPont's position in the cellophane industry.

3. Patents

DuPont did not get cellophane patents to exclude competi-
1729 tion. There is no evidence duPont purchased a quantity of patents or its purposes in acquiring such patents were anything but proper. The Supreme Court said in Automatic Radio Manufacturing Co., Inc. v. Hazeltine Research, Inc., 339 U. S. 827, "the mere accumulation of patents, no matter how many, is not in and of itself illegal." An examination of duPont's patent

portfolio and circumstances under which its patents were acquired, fails to show acquisitions affected its ability to exclude competition.

This case is concerned, in the main, with moistureproof cellophane. Other patents which duPont secured by its own invention or from third parties did not enhance duPont's power to exclude others from moistureproof cellophane production. None of these patents could have been practiced by anyone to produce moistureproof cellophane without rights under the basic product patent.

It is undisputed duPont at no time controlled patents which stopped others from manufacturing plain cellophane on a commercial basis.

Proof shows the entire patent portfolio of duPont relating to cellophane, including both patents derived from its own research and patent rights obtained from others, represented a small percentage of the total number of patents relating to cellophane.

The patents flowed from research of duPont and the regulations issued to govern the patent matters of all Departments of duPont, wholly without reference to this litigation.

4. Sylvania Competition

Evidence shows cellophane competition has not in fact been excluded, but flourished. In the case of Sylvania, for example, evidence discloses year by year shifts of business between duPont and Sylvania are in response to competitive pressures. Customers of duPont have been taken away from it by Sylvania and vice versa. Relative proportion of business enjoyed by duPont and Sylvania in the case of particular accounts has changed. It
1730 is reflected in differing rates of increase or decrease in the sales of the two companies year by year. There have been competitors in all sectors of the markets where cellophane is sold. Moreover, these shifts of customers have taken place both as to large and small accounts, and have been present not only in the case of users of packaging materials, but in the case of converters as well, with important converters shifting their business from duPont to Sylvania and from Sylvania to duPont. Sylvania has continued to expand to the full extent of its financial resources; its growth has been substantial and it has increased capacity productivity at a greater rate than duPont. Competition has been present in degree and character of service rendered to customers; it has been present on the technological side, as quality differences have brought about shifts of business between the companies; it has been present as to prices; and it has been present in the development of specific types of films. DuPont in these respects has been superior to Sylvania and its greater success is attributable to this

superiority. But this in no way diminishes the continuing character of the competition itself. In the case of Olin, a newcomer to cellophane, it has succeed in establishing a profitable business by taking business away from both duPont and Sylvania. It is a growing company and like Sylvania has plans for substantial increase in its capacity.

I think duPont's 75% of cellophane production represents nothing more than its superior skill and some advantage it had by reason of having been a pioneer in the business and the inventor of the principal cellophane product sold. Indeed, the 75% no longer represents duPont's proportion of the production capacity. For, with the advent of additional capacity installed by Olin and Sylvania, duPont now accounts for but approximately 68% of United States capacity. Absent proof of exclusion, recognizing intensity of competition, and failing to find any phases of the business where duPont is in a position to or does exercise control,

1731 it cannot be said duPont has power to exclude competitors.

DuPont is engaged in a competitive business and all of the benefits which full and free competition are designed to create under the policy and objectives of the Sherman Act are present and operating in full force. This is true if it is regarded the "market" is simply cellophane in contradistinction to my finding the market is the flexible packaging market where cellophane is in competition with a host of other substitute materials.

E. APPLICATION OF RECOGNIZED ECONOMIC TESTS FURTHER EVIDENCES THE LACK OF MONOPOLY POWER

In its briefs plaintiff gave much space to discussion of various economic tests for determining whether monopoly power exists. I discussed these at the beginning. It analyzed views of the behaviorists and then the views of the structuralists. The Government recognized economic doctrine and legal doctrine as to monopoly power are in many respects identical. It concluded "duPont's monopoly cannot be countenanced under either school of economic thought".

I shall not engage in any extended discussion, as I suggested at the opening, as to which group of economists has the better of the argument.

Field of argument on interpretation and enforcement of the antitrust laws is a wide one. I think excellence of corporate function in this country, whether it be small, or big business, calls for a critical re-examination by the Congress, after a half-a-century of the enforcement of the Sherman and allied Acts.

2. DuPont's position is not to be attacked because it results from technical skill and competitive activity

For reasons before summarized, duPont urges as defense the proof fails to establish market control and monopoly powers requisite to the offense of monopilzation.

1732 A. THE MOISTUREPROOF PATENT IS, I CONCLUDE, A DEFENSE

This is the first monopoly case where the owner of a product patent has been accused of having monopolized the patent product of his own invention. It represents a departure from cases which have assumed a product patent confers a lawful monopoly. Bement v. National Harrow Co., 186 U. S. 70, 91; United States v. General Electric Co., 272 U. S. 476, 485; United States v. United Shoe Machinery Company of New Jersey, et al., 247 U. S. 32, 57; United States v. Aluminum Company of America, 2 Cir., 148 F. 2d 416, 422; United States v. General Electric Company, 82 F. Supp. 753, 806, 815.

Evidence shows on November 26, 1929, U. S. Patent No. 1,737,187 issued. This was the basic product patent. It claimed moistureproof cellophane in comprehensive language. The first two claims read:

"1. An article of manufacture comprising a sheet or film of regenerated cellulose combined with a moistureproofing composition.

"2. An article of manufacture comprising a sheet or film of regenerated cellulose combined with a moistureproofing composition, said article being transparent, flexible, and non-tacky."

Validity of these claims and other broad claims contained in the basic product patent was conceded. They are reinforced by basic and equally valid process patents. There is no proof any moistureproof cellophane could have been or in fact ever was made during the life of the product patent which was not equally covered by its claims. Indeed, this patent covered the entire field of moistureproof cellophane, and its strength and broad coverage was recognized.

The patent was based on inventions made by two duPont chemists. DuPont prosecuted the application and held the patent from the outset. The discovery grew out of duPont's desire to develop a product that could compete in the flexible packaging markets with other moistureproof packing materials.

1733 This basic product patent had a life from November 1929 to November 1946. Quality was improved, new types and uses were developed, production and capacity steadily increased, and prices declined. The Government is in the position of granting to duPont a monopoly to promote the progress of science and useful arts and then charging duPont with violations of law be-

cause it has been successful in doing what the laws of the United States invited, and empowered it to do. Powers which are granted under a valid patent are not powers on which plaintiff may rely to establish monopolization. Mere possession of a validly issued patent cannot be made the basis for a prosecution under the monopoly provisions of the Sherman Act. Plaintiff cannot rely, to prove power or intent, upon acts lawfully undertaken to exploit the patent. No action by plaintiff under the antitrust laws can succeed on the ground of power and intent possessed by a defendant if such action is brought while defendant's right to possess such powers and intent was assured through its lawful ownership of a valid patent.

For years courts have tussled with the task of reconciling the Sherman Act with lawful monopolies by patent grant. Many cases under the Act have drawn the line according to the larger aims of public policy—a vigorously competitive economy. Courts have recognized new processes and patents are perhaps the most desirable form of competition. The holder of a patent is, in accordance with the patent laws, permitted to exert monopoly control over what he has created.

Evidence does not disclose combining of competing or independent process patents or efforts to control unpatented products. We have here a case involving the grant to duPont on its own invention of a broad product patent, the validity of which is conceded by plaintiff, and a patent which evidence discloses was of such scope that no one without a grant of a license under it could have manufactured lawfully the product claimed. No
1734 case of this kind has ever been brought before. To declare, as plaintiff seeks, the award of this patent, with the rights implicit in its ownership, is to be ignored in applying the Sherman Act, is to ask the court to declare the Sherman Act repealed statutory provisions under which patents are granted. This I will not do.

No judge has ever said where an inventor discloses his invention in return for the grant by the Government of a 17-year exclusive right to practice the same, and, having been awarded the patent, produces the product, he is guilty of monopolization. The valid product patent represents a defense to the monopoly charge.

B. MONOPOLIZATION REQUIRES A FACTUAL SHOWING OF ILLEGALITY

Defendant contends the offense of monopolization requires, in addition to proof of monopoly power or market control, proof such power or control was achieved in a manner prohibited by the statute. Plainiff contends mere possession of the power, no matter how acquired, in itself establishes a violation. Once power

has been obtained, plaintiff argues, it does not even have to be exercised. Mere possession of power, it is argued, is sufficient to constitute offense of monopolization.

It has been recognized under the Sherman Act "monopoly in the concrete" is not prohibited under the section. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 62. The Act, using the verb "monopolize", prohibits conduct rather than status. It is directed against activities rather than results. This is not a matter of semantics. It is a matter of facts. That this is so is obvious from fact the statute carried criminal as well as civil sanctions. Thus, decisions recognized the manner in which a monopoly position was obtained was a crucial consideration in determining whether or not a defendant has monopolized within the meaning of the Act.

The decisions state a defendant may lawfully obtain a monopoly position if that position is "thrust upon it". 1735 Thus the right to normal growth and to enjoy the results of technical achievement and successful competition has been preserved. But plaintiff, to avoid the teaching of the cases, argues only a monopoly which has been thrust upon a defendant "through circumstances beyond his control" comes within the "thrust upon" exception. As plaintiff makes clear, it means by this, as I get it, only a monopoly obtained by a defendant who can be shown not to have done anything to further its own interests comes within the exception.

This position is theoretical. It is not supported by decisions. On analysis, plaintiff is contending the manner of acquisition of monopoly power is irrelevant to the charge of monopolization. The decisions, on the contrary, demonstrate, if the challenged position is acquired, as it has been in this case, by superior technical skill and effective competitive activity, the resulting power from that position does not establish monopolization within the meaning of the statute.

During discussions in Congress leading to the enactment of the Sherman Act, managers of the bill stated categorically the Act was not directed against one "who happens by his skill and energy to command an innocent and legitimate monopoly of a business." 21 Cong. Rec. 3151 (1890). This view has been followed by the courts. In United States v. American Tobacco Co., 221 U. S. 106, the Supreme Court stated "the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods whether by agreement or otherwise to accomplish such purpose." The reasoning by which it reached this conclusion was fully set forth in the case of Standard Oil Co. of New Jersey v. United States, 221 U. S. 1. Lower federal courts prior to that time had reached decisions to

the same effect. In re Greene, 52 F. 104; United States v. American Naval Stores Co., 172 F. 455; and United States v. Standard Oil Co. of New Jersey, 173 F. 177. Thus, in the Greene case it was said: "* * * congress could not and did not * * *
1736 declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportion as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed * * *". In the American Naval Stores case the Court said: "The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and honest business methods, even if it should result in acquiring the business of competitors, would not make an illegal monopoly. It is the acquisition and use of unfair and illegal power in defeating competition which makes such illegal monopoly". And in the Standard Oil decision it was said that "monopolies of part of interstate and foreign commerce by legitimate competition however successful are not denounced by the law and may not be forbidden by the courts".

The rule thus set down in the early decisions was followed, United States v. United Shoe Machinery Co. of New Jersey, 222 F. 349, aff'd 247 U. S. 32; United States v. United States Steel Corp., 251 U. S. 417; United States v. International Harvester Co., 274 U. S. 693; Apex Hosiery Co. v. Leader, 310 U. S. 469; United States v. Pullman Co., 64 F. Supp. 108. In the United States Steel Corp. case, in attacking the contention that size alone constituted an offense under the monopoly statute, the Supreme Court said: "Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention which regards power rather than its use the determining consideration seems to conflict." Even dissenting judges in this case recognized when "size and power have been obtained by lawful means and developed by natural growth," a corporation having even "a dominating place" is "entitled to maintain its size and the power that
1737 legitimately goes with it, provided no law has been transgressed in obtaining it * * *".

There cannot be controverted the rule of law established by these cases. Plaintiff, however, relies on an interpretation of the decision of Judge Hand in United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416. The Aluminum case did not change the law on "monopolization"; at the most, Judge Hand but changed the verbalistic metaphor by which that law is described.

Judge Hand preceded his discussion of the facts which showed

"monopolization" by Alcoa with the following language (148 F. 2d at 430):

"Since the Act makes 'monopolizing' a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress to include such instances (*as the following*). A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drove out all but one purveyor. *A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.*" [Emphasis mine.]

Following this warning Judge Hand turned to discussion of facts in the Alcoa case and, in describing those facts, used the language on which plaintiff relies. This language was not a statement of a rule of law. It described the means employed by Alcoa over a thirty-five year period to eliminate and prevent all competition. The means included, as Judge Hand noted, the
1738 strengthening of its position from 1909 to 1912 by unlawful practices, the actual anticipation and forestalling of "at least one or two abortive attempts to enter the industry" (148 F. 2d at 430), undisputed success in discouragement or elimination of all potential competition throughout the entire history of the aluminum industry, and proof Alcoa's perpetual monopoly not only offered it an "opportunity for abuse", but that it used its monopoly powers for abuse.

Judge Hand noted examples of monopoly power which would not constitute "monopolization", including monopoly position achieved by "superior skill, foresight and industry" (148 F. 2d at 430). Later the Supreme Court cited Judge Hand's analysis with approval and mentioned as a fourth example a monopoly position achieved by one who made "a new discovery or an original entry into a new field". American Tobacco Company v. United States, 328 U. S. 781, 786 (1946).

The basic question is not determination whether one monopoly is good or the other bad. The teaching of the cases is concerned with how power is achieved. They place acts, not results in issue. A position achieved by "superior skill, foresight and industry" or one resulting from "a new discovery or an original entry into a

new field" cannot be achieved through circumstances beyond a defendant's control. Intense research activity, market development and expansion of productive capacity were a necessary part of duPont's development of cellophane. The Sherman Act was not intended to discourage these things by condemning them as violations of § 1, or by condemning their result as a violation of § 2, as long as results do not flow, in fact, from a course of monopolistic behavior such as followed by Alcoa—"a persistent determination to maintain the control" which it had come to be possessed of; in that case, by reason of originally unlawful acts (148 F. 2d at 430).

The position taken by plaintiff, the existence of monopoly power standing alone is condemned under the Act, unless thrust upon a defendant by "circumstances beyond his control" has no substance as a matter of business reality. Plaintiff's theory leads it to the conclusion when duPont pioneered the cellophane business and thus became the sole manufacturer of cellophane in the United States, in view of its 100% position, it necessarily had monopoly powers and everything it did from that day on was a violation of the Act.

1739

Such views find no support in the decisions or the statute and cannot be made basis for a determination duPont has monopolized. Its "monopoly" was "thrust upon" it within the true meaning of the decisions and, wholly apart from the existence of the moisture-proof patent, the facts as to how duPont achieved its position constitutes a defense to the charge of "monopolization".

C. TECHNICAL SKILL AND OTHER COMPETITION WERE RESPONSIBLE FOR DUPONT'S POSITION IN THE FIELD

I am able, after critical examination of the record, to determine duPont's position is the result of research, business skill and competitive activity. Much of duPont's evidence was designed to show research, price and sales policies of that Company are responsible for its success and these policies were conceived and carried forward in a coordinated fashion with skill, gaining for duPont substantial recognition in the packaging industry.

DuPont was a pioneer. It was the first American company to manufacture cellophane and the first company to recognize this product could be introduced as a competitor in the established packaging market. Nobody at the time recognized the potentials existed in this country for the development of this product, which had only limited acceptance abroad. As pioneer, it entered the business with a legitimate head start. It had the first contacts with the trade; it established the first research facilities; and it was the first to gain experience with the manufacturing processes.

1740 If the product cellophane could be made at lower cost, if it could be made with improving quality, if it could be made and sold in a manner that would enable it to compete in the flexible packaging markets, duPont's business and profits would grow.

This record discloses from the outset duPont set on an intensive research program to improve the quality and characteristics of cellophane and to lower its cost. Starting with a single cellulose chemist in 1924, it built a substantial research organization, equipped not only to engage in fundamental research, but to conduct research directed toward improving both the manufacturing processes and to develop special cellophane types and qualities which would serve the needs of particular categories of customers. Expenditures for this activity grew and were substantial. There is no proof contradictory to statements of the witnesses and the other evidence which establishes research was not only successful but it was one of the factors in the development of duPont's business. Evidence discloses at every stage of the manufacturing process and as to every aspect of cellophane, continuing improvements were made, frequently of a revolutionary nature.

Starting with a product which was brittle, sticky, of uneven gage and which could not be made in rolled form suitable for packaging machinery operations and which was non-moistureproof and in other respects unsatisfactory, duPont by research brought about continuing improvements which gave cellophane acceptability in the trade. Its research energies were confined not to its own manufacturing processes but branched out and involved creative assistance to manufacturers of packaging machines, to converters with their printing and other problems, and to customers in the development of special types of materials designed to serve specific needs.

DuPont's superiority enabled it to make strides in the field of selling. Testimony has outlined in detail the steps duPont
1741 took to introduce cellophane into new and different end uses. Cellophane was sold not by ordinary means of national advertising and high-pressure tactics fortified with elaborate salesmen's entertainment expenses. Cellophane was sold to knowledgeable buyers on the basis of quality performance. Exceptional steps taken by duPont to introduce cellophane into such trades as bread, candy and frozen foods demonstrate acceptance of cellophane because of its creative approach to problems of the industries with which it was dealing and the ability of duPont to solve those problems with the useful results of its research organization.

Findings cover evidence on the many relevant aspects of this problem in detail.

B. Is Origin of DuPont's Position Lawful?

Plaintiff contends duPont acquired an illegal monopoly at the time it entered the business for the reason its basic contracts with the French were part of a plan to divide world markets and thus isolate duPont from import competition. DuPont's embarcation upon cellophane manufacture was lawful and had neither the purpose nor effects attributed to them.

The agreements made by duPont at the time it entered into the manufacture of cellophane in 1923 are the series of formal contracts between duPont and La Cellophane under which the duPont Cellophane Company was organized and rights obtained for it to manufacture under the French secret process.

Each of these undertakings was lawful in the circumstances under which it was made. From an antitrust point of view the form of the transaction is of no consequence. I must be concerned with substance and purpose. The record establishes basic contracts with La Cellophane arose from legitimate business considerations and were what they purported to be in form, namely organization of a partnership with La Cellophane for the manufacture of cellophane in the United States coupled with
1742 licensed agreements under which significant technology was made available exclusively to the partnership in return for stock in the venture. These facts are:

1. La Cellophane developed a successful proven process for the commercial manufacture of cellophane. This process was secret, novel and of commercial value. Plaintiff does not attempt to challenge this fact of importance.

2. When duPont learned of cellophane, it entered upon the manufacture of the product. It was not then engaged in any business which would cause it to fear the competition of cellophane. Rather, it desired to diversify its business and take the business risk of entering this new field. La Cellophane, in turn, had no reason to fear duPont's competition, for duPont had neither the necessary knowledge nor technical experience to compete in cellophane. No one else in the United States was making cellophane or seeking to get La Cellophane's process. It was not practicable to enter upon the manufacture of cellophane without having access to the French process. DuPont had had previous successful business ventures in partnership with the French interests who controlled La Cellophane. DuPont and La Cellophane negotiated in good faith the basic agreements and entered into them in good faith with advice of counsel. There were logical business reasons for the organization of the joint enterprise known as duPont Cellophane Company. DuPont contributed

capital; duPont contributed trained management familiar with United States business conditions who had worked with the French in the manufacture of rayon; duPont could make available facilities at Buffalo which would help get the enterprise going. La Cellophane was in a position to contribute, in addition to capital, substantial technical assistance in the form of operating manuals and procedures, the designing and manufacture of secret equipment, the training of personnel, the imparting of all phases of production line know-how. DuPont and the French thus
1743 each had a legitimate stake in the venture, a participation in the management and profits of the enterprise, and neither party was motivated by anti-competitive considerations. It was a corollary to such a partnership La Cellophane would undertake not to enter into other manufacturing enterprises in the United States in competition with the enterprise that it was assisting to create. The company was thus jointly created to do business in North and Central America and the licenses granted by La Cellophane limited the new company's rights to this area although duPont sought wider rights. Under the license agreement La Cellophane made available designs, process information and trade secrets of a comprehensive character. The data was secret and novel. It had high commercial value and was precisely imparted. It was essential to the manufacture of the product. It was used in actual practice and in fact even today, almost thirty years later, is at the core of duPont's processes for the manufacture of cellophane.

Plaintiff's argument a territorially limited license under a secret process is per se illegal is not accepted.

Defendant's evidence has shown the French process was the only existing commercial process for the manufacture of cellophane, and it was a proven process that worked. It was not known in the trade, nor disclosed in issued patents. It was guarded against public disclosure. Its value is clear not only from the price paid for it at the time but from the expert testimony received as to the amount of effort and money which would have been required to enter the business without it. It was made available in an explicit way, both by writing and plant disclosure. All steps of the process were covered, all aspects of machinery design revealed. Elaborate chemical controls requiring years to develop were explained. The process covered the entire manufacturing process from viscose through casting and drying machines to the plain cellophane itself.

It is not the purpose of the Sherman Act or the common law of restraints of trade to discourage establishment of a
1744 new business in a new territory. Trade secrets have always been considered in the nature of a property right. E. I. duPont de Nemours Powder Co. v. Masland, 244 U. S. 100; and

my views in International Industries, Inc. v. Warren Petroleum Co., D. C. Del., 99 F. Supp. 907. See, Restatement of Torts, § 516, relied on in United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 398, affirmed on this point, 321 U. S. 707, 719. United States v. Addyston Pipe & Steel Co., 6 Cir., 85 F. 271. Among the ancillary restraints which are considered reasonable, both under common law and the Sherman Act, are those which limit territory in which the contracting parties may use the trade secret. Fowle v. Park, 131 U. S. 88; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 53; Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U. S. 373, 402; Thoms v. Sutherland, 3 Cir., 52 F. 2d 592, 595.

Apart from secret process, it is not illegal per se for competitors to combine their resources in a manufacturing joint venture to exploit a particular product or a particular market. The Sherman Act forbids only unreasonable restraints of trade. Standard Oil Co. of New Jersey v. United States, 221, U. S. 1, 60; United States v. American Tobacco Co., 221 U. S. 106, 180. This rule of reason applies to horizontal combinations between competitors as well as to other restraints. Appalachian Coals, Inc. v. United States, 288 U. S. 344; United States v. International Harvester Co., 274 U. S. 693; United States v. United States Steel Corp., 251 U. S. 417. Such combinations occur in American business, as the trade reports of new joint ventures to exploit specific products bear witness. A horizontal combination of two domestic American competitors in an American market was recently upheld in a case arising in this Court in United States v. Columbia Steel Co., 334 U. S. 495.

It is lawful for an American and a French concern who are not competitors to combine their resources in a joint venture absent an overriding unlawful purpose. That was done here. The
1745 purpose of the agreement was the development and exploitation of a new business to function in American markets. The reasonableness of the ancillary restraints on competition—here at the most potential competition since the participants were not in fact competitors—is enforced by the inherent legality of imposing a territorial limitation on an assignment of a secret process. The result of the agreement, in the case at bar, was the creation of the American cellophane industry.

The license arrangements were entered into during early stages of duPont's cellophane business, when it was struggling to establish plain cellophane as a competing product in the flexible packaging market. La Cellophane was a larger and more established producer and owned the essential processes. Its preeminence in the field, however, did not continue for long. Under duPont

management, as the opportunities of the bigger American market were realized, the business here rapidly grew. Within a short time La Cellophane was not able to make any further technical contribution, and the direction of the business had shifted from plain cellophane to duPont's own patented product, moistureproof cellophane. With the development of this product, duPont's production rapidly mounted. Throughout the entire period under review in this case, the bulk of duPont production was in moistureproof cellophane. DuPont owned the product patent which gave it the right to exclude imports into the United States. In addition, it was protected by high tariffs. Evidence discloses duPont's technical superiority and contacts with the trade gave it further assurance against import competition. Foreign cellophane cost more; it was of poorer quality and the foreign manufacturers were not in a position to render the sales service required, nor did they have research facilities to serve the needs of the trade.

Factors that limited imports to the United States from abroad are plain. For a period during the 1930's, Japanese producers sold cellophane in the United States. Their sales were
1746 small and soon ceased. These producers had no agreements with anyone in the United States, and were not blocked by the tariff since their delivered prices were lower than price of domestic cellophane. Yet even their sales stopped. They could make only plain, whereas moistureproof was the core of the business. They could not make rolls satisfactory to users, and overall quality was so poor customers would rarely try Japanese cellophane more than once. American standards of quality and service are confirmed, as the obstacles to invasion of the United States market by foreign producers, by the testimony of businessmen who had purchased or considered purchasing foreign cellophane. Their testimony was, due to deficiencies of quality and inability to obtain technical service, they did not buy.

Plaintiff looks at origins of duPont's cellophane business by claiming that, beyond the license agreements, duPont was carrying on a broad commercial understanding with foreign producers to allocate world territory and thus avoid competition. Failure to prove any effect from it, this cartel aspect of the case raises a straight issue of fact. DuPont did not make such an agreement. The evidence proves this.

Plaintiff's proof on this issue is a meeting at Paris in February 1930 among representatives of European producers, resulting in a master plan for price fixing and market divisions of the world's trade in cellophane. Plaintiff's contentions were denied by Yerkes and the testimony of Swint and Carpenter, and were sup-

ported by uncontroverted proof of basic facts; duPont did not sign the undertaking; its representatives attended as guests and observers, did not listen in on the second day of the two-day conference; facts show they were not authorized to make commitments for duPont and of more importance made none, and of equal importance the head of the Foreign Relations Department of duPont was unaware of the existence of the document until it was offered as evidence by plaintiff at the trial of this case.

1747 Actual conduct of all producers implicated in this agreement is inconsistent with the existence of any cartel. La Cellophane wrote to duPont in 1932, two years after the meeting on which plaintiff places great reliance:

"Owing to the fact that you preferred not to join the Convention we could not keep Wolf and S. I. D. A. C. away from your markets, i. e., the United States, Canada, Etc., as they would not get anything in return, whereas ourselves would, of course, as in the past, refrain from selling in your territory.

"CUBA: being situated north of the Panama Canal, belonging thus to your territory, Wolf & Co. are quite free to fix their selling prices and enter into open competition with yourselves."

Evidence established Wolff sold in North America, though not in the United States. Wolff sought to manufacture in the United States to get behind the tariff wall. Wolff could not get over the tariff, and the tariff wall was the primary obstacle to Wolff.

SIDAC did not sell in North America after 1929. The Government recognizes SIDAC was free to do so. Intricate theories of a conspiratorial network is cast aside. SIDAC's agreement with the Sylvania Industrial Corporation ceded to the latter's exclusive rights to "use the said processes above mentioned in all the North American continent north of the Panama Canal * * * and the Republic of Cuba," much in the manner of the license granted duPont Cellophane Company by La Cellophane. There is no proof duPont was connected with the making of the Sylvania-SIDAC agreement.

Plaintiff has held out GX–1013 as the agreement between duPont and La Cellophane extending rights of duPont to South America. Witnesses and documents show GX–1013 was not ratified by defendant. Its proposals for a price agreement and quota assignments for South America were, in fact, rejected. A

1748 new agreement was adopted by duPont and agreed to by the French, calling for equal rights in South America.

For a period duPont was prepared to respect the construction placed upon "equal rights" by La Cellophane, i. e., a 50–50 division with La Cellophane of South American business. It became clear La Cellophane was not prepared to devote effort to South

American business, nor did La Cellophane provide duPont with any information as to how division was to be computed. Thus, Yerkes' advice to La Cellophane less than two years later: "Considering all of the circumstances we must consider ourselves free to pursue our own policy of sales in South America, Japan and China". The reasons for this action, and duPont's relationship with other Europeans as to South America business are summed up by May (GX-1036, p. 1068):

"The attempt at reparations took the form of extending our territory beyond North and Central America, but that extension was based upon some fancy European 'consortium' that apparently never worked out * * * the whole thing was based upon an impracticable premise and I though so at the time * * *

"When we talk about 'equal rights' with La Cellophane, it is, among other things, assumed that their rights with others can be maintained—otherwise what rights have we except to assert our own to solicit business in South America and to derive the benefits that come from a real sales effort free from a lot of impracticable European business policies? While they were 'negotiating' and talking about 'quotas' and doing other 'easy chair' things, we attempted to develop a market by real work, consisting of sending qualified salemen using the very best methods that were successful in this country. The result has been that our business is expanding because we did something about it and the reward is a claim upon us to divide."

The basic fact is duPont refused to divide; it competed vigorously.

1749 Price quotations of every producer in South America were different. Proof shows a pattern of price-cutting by British, French, Belgian and German producers and efforts of all of them and of duPont to get business wherever it could be found. One trade report develops a case history of price competition between duPont and SIDAC over a single order, and exemplified the type of furtive warfare that characterized the South American trade. This was the norm for that market as is emphasized by a witness who saw it first-hand (Swint, Tr. 6212).

Evidence disproving any theory of quota assignments in South America has been shown. Quantities sold to South America from different nations demonstrate ratios between American, British, French and Belgian producers were not the product of anything but ability of each producer to make a sale. At outset, duPont sold in excess of what plaintiff contends it was limited to. This fact brought requests from La Cellophane that duPont permit the French to even the sales, or duPont make offsetting payments, requests which duPont declined. Thus, in every market where duPont sold, it fought the cartel group.

C. Was DuPont's Position Maintained by Predatory Assertion of Monopoly Power?

1. Tests to be applied

Plaintiff contends duPont acquired its position unlawfully and has maintained that position by various predatory practices. Thus, plaintiff rests its case upon so-called predatory practices. These are said to be responsible for duPont's start in the business, to be responsible for its success, and to have been the motif of its entire conduct.

Exercise of monopoly power can be shown only where the act can be directly related to the company's aggressive use of a
1750 monopoly position to accomplish an exclusionary result.

For example, the concerted acts of the tobacco companies in raising and lowering prices to eliminate specific types of competition, without regard for manufacturing cost or other competitive considerations, was found to be an exercise of monopoly power. American Tobacco Co. v. United States, 328 U. S. 781, 804–807. This conduct had an exclusionary intent and an exclusionary result. Plaintiff, on the other hand, has only suggested a series of transactions which it seeks to claim were restraints of trade and asks the court to infer these restraints could only have taken place in the area of monopoly power.

It is necessary for plaintiff to show restraints not only existed but they contributed to the achieving or maintenance of duPont's power. For example, considerable proof was offered as to whether or not prices of plain cellophane were fixed in Brazil for a period of several years in the 1930's. While evidence shows they were not, there could be no connection between such price activity and duPont's position in the manufacture of cellophane in the United States. Similarly, evidence was offered at one time an employee of duPont referred to a cancellation provision of a use patent license as being a provision by which the licensee could be forced to purchase cellophane from duPont, but there is no proof any tying took place, that any licensee under a use patent was forced to buy from duPont, or any contract was cancelled for failure so to buy. The claim is made duPont's pricing methods were at some points inconsistent with interpretations of the Robinson-Patman Act. But, evidence shows Sylvania followed identical pricing methods; and there is no proof any particular purchaser had its purchases channeled to duPont because of the discounts allowed or Sylvania was injured thereby. Testimony is to the contrary both on the part of purchasers and of Sylvania. It is charged duPont restrained trade by acquiring patents from others which it did not use. While the reasons for this non-use are clear, the use or non-use of the patents had nothing to do with du-

1751 Pont's position as a manufacturer of cellophane, for there is no showing patents were acquired from others who intended to use them in the manufacture of cellophane. Moreover, patents could not have been practiced by others without a license under the basic moistureproof patent.

This is not a case brought under § 1 of the Sherman Act, or § 3 of the Clayton Act or the Robinson-Patman Act. I have no reason to determine whether a particular practice does or does not restrain trade in a manner that violates these laws until it has first been show one of two conditions has been satisfied. Unless evidence shows the particular practice was an assertion of power to fix arbitrary prices or to exclude competitiors or, in the alternative, practice is shown to have been reasonably related to the maintenance or acquisition of duPont's position, it has no relevance to this case. Plaintiff has not by its attack been able to uncover any conduct to demonstrate duPont's position has been either acquired or maintained by predatory acts. Plaintiff has burden of proof in this regard, and it has failed to sustain that burden. Cf. United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 423, 426, 434, 435.

2. Alleged Suppression of Sylvania

Plaintiff claims Sylvania was suppressed and failed to name Sylvania as a defendant. Plaintiff contends Sylvania was a willing collaborator with duPont, the suggestion being the two companies joined to exclude others. Without attempting to sort out conflicting contentions, plaintiff attacks validity of the moistureproof license agreement and it charges a conspiracy to fix prices.

A. THE MOISTUREPROOF PATENT LICENSE AGREEMENT

Terms of moistureproof license agreement of 1933 are not in dispute. Sylvania commenced manufacture and sale of moistureproof cellophane after duPont's basic product patent issued and with the knowledge it was infringing that patent. DuPont
1752 was confident of its patent and, after warning Sylvania, brought an infringement action. After suit, there followed a settlement of the patent controversy. Evidence is the resulting agreement, negotiated at arm's length between the parties, constituted the entire understanding. Under the agreement, duPont granted to Sylvania what was an exclusive license under the basic product patent, and under certain important process patents for the manufacture of the product which had issued at that time. The agreement was limited to the field of moistureproof cellophane which was dominated by duPont's basic moistureproof

product patent. There were no provisions for disclosure of applications or technical information and no commercial provisions relating to price, limiting exports or the like. Royalty rates were set which provided for increased payments to duPont whenever Sylvania's domestic sales under the patents exceeded specified percentages of total domestic sales of moistureproof cellophane.

Plaintiff looks to an unsigned memorandum apparently written by Yerkes, which he does not recall, in which it is suggested all improvements and patents relating to regenerated cellulose coatings should be thrown "into the pot" for mutual protection during life of the agreement. It is suggested this memorandum establishes the existence of an illegal closed patent pool. To me it does nothing of the sort. The particular memorandum deals with a proposal by Dr. Wallach and suggests provisions in the agreement which were not finally adopted. No "pot", in fact, existed, for many patents were cross licensed only for additional royalty and others not licensed at all. It was a closed arrangement only in the sense the licenses granted were exclusive and nobody, not even Sylvania, could make moistureproof cellophane without a license under duPont's basic product patent.

As owner of these patents, duPont had right to grant an exclusive license and under the cases such a license in no way violates
the provisions of the Sherman Act. Bement v. National
1753 Harrow Co., 186 U. S. 70, 94; Virtue v. Creamery Package
Mfg. Co., 227 U. S. 8, 36–7; DeForest Radio Telephone Co. v. United States, 273 U. S. 236, 242. As patentee, duPont's right to license included the right to select or reject prospective licensees and to prefer one over others for considerations within its discretion. Standard Oil Co. (Indiana) v. United States, 283 U. S. 163, 179; see also United States v. United Shoe Machinery Co., 247 U. S. 32, 58; American Equipment Co. v. Tuthill Bldg. Material Co., 7 Cir., 69 F 2d 406, 408; Westinghouse Electric & Mfg Co. v. Cutting & Washington Radio Corp., 2 Cir., 294 F. 671, 673; United States v. Parker-Rust-Proof Company, et. al., 61 F. Supp. 805.

This agreement contained provisions for licensing of certain future patents, but these were drawn so as to limit both the number of patents and the effect of any future licensing. DuPont was obligated only to license those patents which related to moistureproof cellophane and to offer them for licensing so long as the basic patents were in effect. In addition, duPont reserved right to charge additional royalty for significant inventions and, in fact, made such charge in certain cases. Sylvania, on the other hand, was obligated only to offer licenses to duPont under patents which it might develop at a later date which fell within the field of the basic moistureproof patent.

This grant-back, which in actual practice involved the licensing of only nine patents, was within the rule most recently enunciated in Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U. S. 637. The patents which duPont received from Sylvania under the agreement in no way enhanced duPont's power as to moistureproof cellophane. Sylvania could not have lawfully manufactured moistureproof cellophane without a license. It used a number of the patents licensed under the agreement, which enabled it better to compete with duPont. There is no proof any one ever requested a license under either duPont's patents or Sylvania's patents to manufacture moistureproof cellophane and was refused a license.

1754 Legal significance of these facts is made clear by Judge Hand's opinion on the remand of the Transparent-Wrap case. In considering the possible application of the Supreme Court's caveat as to the possible illegality of grant-back provisions, where Transparent-Wrap had licensed the basic Zwoyer product patent, Judge Hand wrote:

"In support of this plaintiff argues that, when the defendant fortified the monopoly of its own patents by acquiring the plaintiff's patents, it secured a 'double monopoly,' which was an unlawful restraint of trad en though taken by itself the acquisition of those patents was lawful. The period, to which any such restraint is necessarily limited, is that during which both the Zwoyer patents and the plaintiff's patents will be in existence; for we must obviously disregard any period after the expiration of the Zwoyer patents, during which the plaintiff's patents may remain in force. In that period the defendant's control will be precisely the same as the plaintiff's would have been, had it not assigned. During what we may, however, call the joint period it is true that the defendant will have a monopoly, not only of the Zwoyer machine itself, but of any improvements upon it covered by the plaintiff's patents: verbally, that is a 'double monopoly'; actually that phrase adds nothing to the defendant's control over production. No one will be able to use, make or vend the Zwoyer machine without its consent, and no one can use, make or vend an improvement without using, making or vending the machine improved. The defendant's control over the industry will be no greater by virtue of the improvement patents; all it will gain during the joint period is a freedom to all the improvements to the Zwoyer machine, which it would not otherwise have had, for its license from the plaintiff terminated with the contract.

"Moreover, even though the plaintiff had proved that there were machines which some of its own patents cover, but which the defendant's patents do not, the record would not be sufficient

1755 to raise any question of the Anti-Trust Acts. That would have shown that during the joint period, the defendant would have extended its control over the industry; but extension, merely as such, would not be enough. It would remain possible that, while the Zwoyer patents were in existence, any putative machines which they did not cover, and which the plaintiff's patents did cover, would not be important competitors with the Zwoyer machine itself; and it is hornbook law that not every restraint of competition is 'unreasonable' and that only 'unreasonable' restraints are unlawful. All this the plaintiff should have developed at the trial, if we were to pass upon it; upon the record as it comes to us, no restraint of trade appears—to say nothing of any 'unlawful' restraint." 2 Cir., 161 F. 2d 565, 577, cert. den. 33 U. S. 837, reh. den. 332 U. S. 787.

There is a failure here to show the grant-back provisions had the restrictive effects demanded in the tests laid down by Judge Hand.

Plaintiff has sought to bring the moistureproof license agreement within the holding in the Cracking case, Standard Oil Co. (Indiana) v. United States, 283 U. S. 163, and other cases which have followed it, condemning patent agreements under which dominant members of an industry cross license competing process patents in a manner that restrains trade. The moistureproof patent license agreement was not such an agreement and the holding in these cases is not in point.

The license in the Cracking case was a cross license of competing process patents. There were no product patents involved as to the field of the agreement. Royalties were pooled, dominant licensors were given the right to sublicense each other's patents, and technology was cross licensed as well. This fact situation involved wholly different considerations than are present, here, under an agreement involving merely a one-way grant of a license under a basic product patent and related process patents with strictly limited grant-backs having no restricting effect.

1756 Similarly, the National Lead, Line Material and Besser cases, cited by plaintiff, are not controlling. The National Lead case cross-license went far beyond improvement patents and included all patents in the titanium pigment field. The Line Material case involved price fixing under pooled patents. The Besser case was not even a cross-license case, but involved an arrangement between licensees restricting the freedom of action of the licensor.

There is no decision which I could find, after long research, which holds a license agreement such as the one involved here violates the Sherman Act. Granting validity and scope of du-Pont's basic moistureproof patent, it is difficult to show how du-Pont can be held to have restrained trade by granting a license

which permitted another to manufacture lawfully the patented product, when there is no showing that as a result of the agreement duPont's position was in any way enhanced or others who might have desired a license were precluded from entering the field. Cases on which plaintiff relies deal with combinations of patents under circumstances where the cross licensing parties sought to create a position of market control beyond that which either of them was entitled to through the exercise of its own patents. None of the cases affect legality of the grant-back provisions of the Sylvania license under the tests stated by Judge Hand in the Transparent-Wrap case.

As patentee duPont had right to fix royalties at graduated scales on amount of Sylvania's production. United States v. General Electric Co., 272 U. S. 476; General Talking Pictures Corp. v. Western Electric Co., 305 U. S. 124. No limitation of production by Sylvania under its own patents existed or is charged.

In its contentions of suppression of competition and assertion of monopoly power, plaintiff fails to come to grips with fact throughout the period that graduated royalties were in effect, Sylvania's entire moistureproof production fell within valid claims of the broad product patent. The record shows Sylvania
1757 produced moistureproof cellophane utilizing the patent. It was not required to pay any royalty if it developed types of cellophane not covered by the patent. On these facts, there is no authority to support the contention it would have been in any way illegal under the Sherman Act for duPont to limit Sylvania's production. The cases are owner of a valid product patent may by license restrict production of the licensee to a specified quantity, at a specified place.

As far as this monopoly case is concerned, evidence is clear the royalty provisions did not limit Sylvania's production. Sylvania never sold an amount of cellophane which exceeded the amount allowed before additional royalty was assessed. During the period the agreement was in force, it could have sold, without paying additional royalty, 54,000,000 additional pounds of moistureproof cellophane, which would have amounted to a 31.4% increase in its domestic sales. And in all years, its domestic sales fell far short of the poundage permissible without additional royalty. More than that, its officials testified its plans for expansion of production were not affected by the royalty provisions of the agreement, the company never followed a policy of curtailing its production; and the royalties did not impair the company's ability to compete. From the evidence Sylvania expanded and to full extent of its financial abilities. It was not impeded by the royalty provisions of the agreement. Without a license it could not have competed at all.

B. THE ALLEGED PRICE AGREEMENT

Plaintiff originally urged duPont and Sylvania fixed prices for plain and moistureproof cellophane.

To support price fixing charge, plaintiff sought to introduce price lists of Sylvania which reflected identical prices to those charged by duPont and bore identical effective dates. DuPont's objections forced an authenticating witness to the stand—Hamburg, Assistant Sales Manager for Sylvania. On cross-
1758 examination it developed Sylvania price lists were not what they purported to be. They were not issued on their effective date, but were issued several days later. Hamburg testified Sylvania "in every instance" first heard from duPont's price lists by picking up copies from customers in the trade.

Specifically, Hamburg said "there is no one in our organization, so far as I know, that had any inkling of an impending price change. That also came through the customers and prospects."

When copies of the price changes were obtained from the trade by Sylvania, it reprinted its own price lists conforming the prices to duPont's prices, and back dated its price lists to the effective date of the duPont list. Thus, from cross-examination, it was made clear, there was no understanding between duPont and Sylvania price identity arose from collusive action.

Testimony of Hamburg was confirmed by Sylvania's President, by its Vice President in Charge of Sales, and by Yerkes. All denied existence of any plan or agreement or arrangement between the two companies to fix prices or to charge identical prices.

There is no evidence in the documents there was any discussion between the representatives of the two companies looking toward any such agreement. The contemporaneous documents show Yerkes desired no action to be taken which would in any way prevent duPont from having complete independence of Sylvania as to prices.

Evidence shows repeated activity by Sylvania cutting prices below list prices. Many different techniques were used by Sylvania to depart from its price lists to obtain business by price advantages offered customers. It departed from discount schedules. It gave wholesale prices for retail purchases and shaved prices.

There could not have been disparity for the evidence shows when price differences existed between duPont and Sylvania, the company with the higher price had difficulty selling its
1759 product. Indeed, Sylvania was forced to bring its prices into line with duPont after attempting to charge a higher price, because it lost business. In fact, price disparities appeared with greater frequency than plaintiff acknowledges. It is not

correct they existed only subsequent to bringing of this litigation. Not only were the terms of sale different from 1941 on, during which period duPont had no cash discount and Sylvania had a one percent cash discount, a difference of almost one-half cent a pound, or $5 per thousand pound order, but basic price lists were different throughout the year 1947. DuPont made many special types of cellophane not made by Sylvania. These were "tailor-made" for specific end uses, and even where price identity on the list existed, the value of the product for the price paid was greater when acquired from duPont.

Proof fails to show the price conspiracy claimed.

3. Patent Practices

Plaintiff pointed to a group of patent license agreements which it claimed affected duPont's position and demonstrate unlawful exercise of monopoly power. Each of these patent agreements involves valid patents, and it cannot be contended in the exercise of lawful rights under valid patents duPont was improperly exercising monopoly power. Legality of these agreements is not challenged. Examination of the various patent licenses must be made to demonstrate absence of proof as to their effect on duPont's position or of any relation between them and the charges of monopolization.

1. ULTRA-VIOLET LIGHT LICENSE. This agreement involved a non-exclusive cross license of conflicting patents. The type of film is a high-priced specialty, accounting for a negligible volume of business. No person is shown to have been denied a license under these patents.

1760 2. RIBBON LICENSES. The complicated story of these licenses pertains to two agreements which were in effect from 1937 to 1940. They concern plain cellophane as used in the fabrication of ribbons, a use which never accounted for as much as 1% of duPont's business. No evidence appears the royalties charged Sylvania for its licenses were unreasonable or limited Sylvania's production, and no evidence the arrangements kept anyone from making cellophane ribbons.

3. ETHYLENE GLYCOL LICENSE. This was another non-exclusive license and no exclusionary effect was shown. Sylvania needed a license to use ethylene glycol as a softener for its cellophane manufacture and under the license obtained the right and used the patents. No person was denied a license under these patents.

4. MARATHON LICENSE. This was a non-exclusive license granted to Marathon to permit it to make its own patented and

competitive cheese wrap using moistureproof cellophane. The license had no restrictive effect upon Marathon. Both duPont and Sylvania were free to sell to Marathon. The license was in effect for a few years, and Marathon operated under it for a short time. Marathon was not restricted as to supply or prevented from doing anything it desired to do.

5. THE SEALING LICENSE. These licenses were in effect from 1931 to 1936. There is no evidence duPont's licensing arrangements extended the scope of the patents. Plaintiff criticized duPont for suing an unlicensed Sylvania customer under the patents, which were held invalid as a result of the litigation. DuPont acquired the patents in order to protect its customers from infringement suits, and was obligated to bring such suit by its contract with the original owners of the patents. In any event, it lost the suit, and no evidence exists it placed unreasonable
1761 restraints upon anyone. The agreements soon terminated and the inventions in issue were supplanted by more modern technology.

6. INTERFERENCES. The 15 settlements of patent interferences arose in the normal course of duPont's business and were made in accordance with the rules of the Patent Office which declared the interferences in the first place. Each settlement was an arm's-length transaction. No evidence shows anyone was prevented by the terms of the settlement from engaging in any phase of the cellophane business. The parties to the interferences were concerned with other products and other activities. To the extent these parties had inventions that related to some aspect of the cellophane business, duPont received rights under these inventions. But the evidence shows in many instances duPont was prior and would have received the rights anyhow, had the interferences been litigated through the Patent Office. Evidence shows even had the inventions been awarded to other parties, there were no instances where they could have been practiced in any phase of cellophane manufacture without rights under duPont's dominant moistureproof patent. In most instances the inventions were of minor consequence, particularly the group pertaining to resin wax compositions.

7. TYING PROVISIONS. The tying situations on which plaintiff relies occurred a decade and a half ago. It is clear duPont as a matter of policy took effective steps to prevent any tying immediately after the Supreme Court decision in Leitch Manufacturing Co. v. Barber Co., 302 U. S. 458. There is no evidence of tying after that date. The proof shows implementation of the duPont policy. Technical questions are present as to whether there was, in fact, an illegal tying in any of the instances prior to that date. Of greater consequence is the fact not actual tying is shown.

1762 No evidence shows anyone was forced to buy an unpatented product from duPont by the license of a patent. No evidence shows threats being brought to tie unpatented goods. There is no evidence the two or three instances stressed by plaintiff had any effect whatsoever.

The few license agreements and interference settlements are of minor consequence when judged as a group against a whole area of duPont's patent activity over a quarter of a century. Many of the agreements were of limited duration. They pertain to minor aspects of the business. They did not affect an appreciable volume of sales, nor do they show any measurable effect. The record discloses duPoint had scores of other licenses and patent relationships which, while scrutinized by the Government, were given a clean bill of health, for they are not challenged now. It is difficult to see how the few instances to which plaintiff directs its criticism can serve to support the contentions duPont's patent practices evidenced the intentional predatory assertion of monopoly power.

4. Control of Distribution Outlets

This phase of plaintiff's predatory practice case has been difficult to understand. Plaintiff offered proof of some distribution practice and when challenged conceded the practice was normal as a matter of business conduct, as well as lawful. Plaintiff's position appears to be since duPont had a substantial percentage of cellophane production, any distribution plan adopted would have been improper and that its only recourse was to sit back and wait for people to come to its plant and take away cellophane. DuPont had to sell the goods it made. It had to adopt a plan of distribution.

Plaintiff sought by an incessant reiteration of assertions that "this was done to promote and maintain a monopolistic position", "this was arbitrary treatment of customers", and "this was discriminatory". These claims have not been supported by proof.

1763 In a business involving thousands of customers over a period of almost 30 years, one would expect in some way at least one customer would develop a grievance from some real or fancied situation he deemed unjust. Plaintiff called no witness who were customers of duPont. Plaintiff conceded it had no complaint whatever from any customer as to duPont's treatment. Eleven customers of duPont were cross-examined by plaintiff at trial or on deposition. Not one suggested his company had received anything but fair treatment throughout its entire dealings with duPont.

Plaintiff's proposed findings concentrate especially upon duPont's selective converter policy and its discount policy. In the former case, reliance is placed upon a single exhibit, GX 5047, which outlines the selective converter program. That program is conceded to be legal, for it entailed little more than duPont's wholly independent and lawful exercise of its undisputed rights to select the persons to whom it would sell. United States v. Bausch & Lomb Optical Co., 321 U. S. 707; Camfield Mfg. Co. v. McGraw Electric Co., D. C. Del., 70 F. Supp. 477. DuPont chose to sell through a limited but steadily expanding number of converters, rather than by offering its goods to converters generally. In promoting its new and high-priced material, it concluded this would enable it to select concerns who were interested in promoting cellophane and would encourage these concerns to give their best efforts to the distribution of cellophane. In selecting its converters, duPont acted independently and not in concert. Such a selective policy is a recognized distribution method and encouraged by the Department of Commerce in memoranda it has given business concerns.

The master fact revealed by GX 5047 is disregarded by plaintiff in its proposed findings of fact and in its brief. Given legality of this distribution method, its only significance can be in terms of intent. Plaintiff ignores that portion of the document stating the intent. As the document makes clear, duPont entered
1764 upon a selective converter system because it found this essential to compete with the principal competitor of cellophane, namely paper.

DuPont is charged with executing "exclusive" contracts with some of its converters, thereby channeling the business of the principal converters to itself. Such arrangements are of course lawful per se under the Sherman Act. United States v. Bausch & Lomb Optical Co., et al., 45 F. Supp. 387, aff'd by evenly divided court, 321 U. S. 707 (1944); Appalachian Coals, Inc. et al. v. United States, 288 U. S. 344; D. R. Wilder Manufacturing Company v. Corn Products Refining Company, 236 U. S. 165; Virtue v. Creamery Package Manufacturing Co. and Owatonna Co., 227 U. S. 8; Continental Wall Paper Co. v. Louis Voight and Sons Company, 212 U. S. 227; American Sea Green Slate Co., et al. v. O'Halloran et al., 2 Cir., 229 F. 77; Carter-Crume Co. v. Peurrung, 6 Cir., 86 F. 439; United States v. Western Union Telegraph Co., et al., 53 F. Supp. 377; Baran v. Goodyear Tire & Rubber Co., et al., 256 F. 571; United States v. American Can Co., et al., 230 F. 859; 234 F. 1019, app. dism. on mot. U. S., 256 U. S. 706; In re Greene, 52 F. 104; cf. Camfield Mfg. Co. v. McGraw Electric Co., D. C. Del., 70 F. Supp. 477; Federal Trade Commission v. Paramount Famous-Lasky Corp., 2 Cir., 57 F.

2d 152; Westway Theatre, Inc. v. Twentieth Century-Fox Film Corp., et al., 30 F. Supp. 830; Whitwell v. Continental Tobacco Co., et al., 8 Cir., 125 F. 454; see United States v. Columbia Steel Co., 334 U. S. 495, 524.

The converter contracts had little effect upon duPont's position. These contracts were in effect from late 1938 to January 1, 1947. They were term contracts running for but one year, and terminable by either party of 30 days' notice. Converters shifted back and forth between duPont and Sylvania. The record shows the exclusivity feature of the contracts was more theoretical than real. Moreover, duPont did not compel converters to sign the promotional converter or so-called "exclusive" converter contracts, and the majority of converter contracts had no such privision.

1765 The evidence shows there were always many well qualified converters in no way under duPont's control who effectively competed by converting Sylvania cellophane, and that Sylvania at all times had fully adequate converter outlets. The proof is clear the volume of duPont's sales to converters has been due to the superior quality of duPont cellophane, better service, and creative selling.

Plaintiff's attack is principally directed against alleged violations of the Robinson-Patman Act in the sale of cellophane. This is not a litigation to determine whether such violations took place. The complex issues of cost justification and competitive relationships between different categories of buyers have not been litigated. Cf. Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 745–746. DuPont sought to comply with everchanging interpretations of this very complex statute. No intent to violate the Robinson-Patman Act was shown. DuPont's discounts were reviewed by counsel upon the passage of the Robinson-Patman Act, and revised in accordance with the legal advice. As later interpretation of the statute occurred, the discounts were again reviewed by counsel, and legal advice was again followed. DuPont believed at the time both its quantity and functional discounts have been in accord with the Robinson-Patman Act as contemporaneously interpreted.

DuPont established its discounts to purchasers before Sylvania had come into existence. Quantity discounts followed custom trade practice and appeared to be within the requirements of the Act. Cf. American Can Co. v. Bruce's Juices, Inc., 5 Cir., 187 F. 2d 919, 923; Minneapolis-Honeywell Regulator Co. v. FTC, 7 Cir., 191 F. 2d 786, cert. granted, 342 U. S. 940. Functional discounts were set so different discounts were never granted to purchasers performing the identical function and hence were within the requirements of the statute. Cf. Chicago Sugar Co. v. American Sugar Refining Co., 7 Cir., 176 F. 2d 1, cert. den. 338 U. S.

948. See Schniderman, "The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571.

Throughout trial, plaintiff sought to supply proof of competition between classes of purchasers given different functional discounts by complaints it does not understand the difference between a converter and fabricator, and since both classes process cellophane they must compete. This does not supply the nonexistent proof a maker of cellophane straws or of Christmas tree ornaments competes with a maker of cellophane bread wraps or potato chip bags. No violation of the Robinson-Patman Act can be inferred from different functional discounts granted to such disparate enterprises.

DuPont's practice prior to January 1, 1947 of charging a higher price per pound on orders less than 500 pounds, which plaintiff terms "the price list discount", needs passing consideration. Sylvania had the same discounts, and plaintiff did not even attempt to prove a single customer ever purchased from one company rather than the other because of this pricing system.

Proof of monopolistic effect of duPont's functional discounts is absent. The evidence is clear Sylvania had the same discounts, so no advantage was to be gained by purchasing from duPont. Again, there is no proof any customer ever ordered a single pound of cellophane from duPont rather than Sylvania because of the existence of functional discounts. If such proof existed, plaintiff would have presented it. Proof establishes quality, service and selling effort were controlling factors in the struggle for sales.

The question of duPont's quantity discounts, which were in effect from before 1928 to 1947, was resolved at trial by plaintiff's concession it could offer no evidence that any duPont quantity discount caused any restriction on Sylvania's production or sales. Plaintiff's case as to effect was admittedly theoretical and came to grief when it encountered the facts. The facts are: (1)

1767 Sylvania offered the same quantity discounts as those currently offered by duPont; (2) Sylvania sold its capacity; (3) the record fails to show an instance in which a customer bought a pound of duPont cellophane rather than Sylvania because of the existence of duPont's quantity discounts.

Plaintiff's remaining effort to find some competitive effect on Sylvania is the assertion Sylvania was disenabled "to a substantial degree from competing with its full effectiveness" because on occasions it indemnified purchaser for a loss of quantity discount not earned from duPont. Dr. Reichel testified Sylvania was able to sell its entire output at all times and was usually oversold, that on some unspecified number of occasions Sylvania did indemnify

customers on quantity discounts, but that "it didn't work this way everywhere and it was always voluntary with us where we would permit it to work or whether we wanted the business, see, on that basis". Monopolistic effect and impairment of ability to compete cannot be derived from a factual situation of a company always selling to capacity and in the course of its sales choosing of its own free will whether it will supply one customer at its regular discount rate and another on a more favorable basis. Evidence shows many quantity discount customers bought from both suppliers, and there is no evidence that all or any measurable part of these ever received anything other than the regular quantity discount of each supplier.

Plaintiff's charges as to the distribution aspect of the case are without foundation in the record.

5. Evidence Plaintiff Ignores

Plaintiff asks a finding duPont throughout the 30 years of its cellophane business was motivated by a deliberate unlawful intent. It points to no single transaction to support this contention. It sought to draw from normal business conduct inferences of criminal motive and proof of illegal acts.

1768 As part of this studied tactic, I cannot ignore the testimony. Witnesses cannot be brushed to one side.

There were 39 witnesses who testified in this case. Of these, 31 were not employees of duPont. This group of independent witnesses was principally made up of business men from many different parts of the country. They included alleged potential competitors whom plaintiff continues to urge duPont sought to prevent from going into the business of making cellophane, but who testified categorically to the contrary. They included converters of cellophane, whom plaintiff urges were restricted and controlled by duPont, but who testified explicitly to the contrary. They included manufacturers of flexible packaging materials whom plaintiff insists do not compete with duPont, but who explicitly testified to the contrary. They included buyers and converters of materials sold in the flexible packaging markets who testified to conditions in those markets which plaintiff continues to assert do not exist. They included three representatives of American Viscose who denied charges of suppression and conspiracy. Testimony of all witnesses is supported by substantial documentary proof.

Witnesses from duPont were called to testify as to questions of motive, purpose and intent. Testimony of these witnesses stood the acid test of cross-examination. The principal executive of duPont responsible for the development of cellophane through

almost the entire period of the complaint categorically denied plaintiff's charges in general and in particular by explicit testimony, and was not even cross-examined. One of the leading research chemists of duPont responsible for the largest group of patents in its cellophane portfolio was not even cross-examined. Other witnesses such as Mr. Walter Carpenter, a chief executive of duPont, during the period of cellophane development, were examined perfunctorily.

To reach inferences which plaintiff seeks this court to draw from its selected use of documentary materials would
1769 necessitate a determination by this court the testimony of these witnesses was false. After months of study and critical examination of the Record and recollection of seeing and hearing these witnesses throughout many long trial days, such a conclusion I cannot reach with validity. They were not discredited—in many instances, not even challenged—and such a conclusion is beyond my ken.

It is impossible to believe over a period of 30 years every act of those engaged in the development of duPont's cellophane business is tainted by illegal motive, undertaken with knowledge of illegal purpose, and an urge to achieve monopoly by predatory practice. This was not the dominant motif of duPont's entire conduct.

PART II—CAPS AND BANDS

NO FACTUAL BASIS EXISTS FOR CLAIMING A VIOLATION OF § 2 AS TO CAPS AND BANDS

One tag end of this case remains—alleged monopolization of cellulosic caps and bands. Plaintiff conceded in response to the court's questions caps and bands represent a distinct and separate product monopolized, and asserted in effect the Government was charging two monopolizations, the first of cellophane and the second of caps and bands. While contending cellophane and caps and bands are separate parts of trade and commerce, it has undertaken to mix these two different fields of business activity together in the manner of the complaint. This leads to confusion.

DuPont does not make caps. It withdrew from the manufacture at the time the complaint was filed. Obviously it could not have monopolized caps and has no monopoly now.

DuPont makes bands in one plant at Buffalo on two machines. Its production accounts for 64.4% of total caps and bands production, compared to 84% in 1933.

1770 There is no competition from imports because of a 60% ad valorem tariff which has been in effect since 1922, long before duPont engaged in the business.

DuPont, however, encounters intense band competition from both Sylvania and Celon. Both of these companies have expanded. Sylvania has twice as many band machines as duPont. Celon's percentage of domestic band sales in the period when duPont's was substantially declining, grew from 12% in 1934 to 30% in 1947.

Additional effective competition in this line of business is offered by manufacturers of many other types of secondary closures which are functionally interchangeable with duPont's bands and are used by the same classes of customers for the same purposes. Thirteen different types of competing closures are listed in the findings with facts as to their uses and the degree of competition. Competition as to service, competition as to price and competition as to quality exist, and shifts of business within the various major end uses are proven. The relative percentage of business enjoyed by the different cellulose band manufacturers has varied substantially from year to year.

Plaintiff concedes absence of price identity. Celon's prices are lower than duPont's in many important segments of the trade. All manufacturers are licensed non-exclusively under the principal patents in the art. There are no patent obstacles to manufacture. There is no proof of anyone being excluded from the business and no proof duPont exercises any degree of control over patents, raw materials, distribution outlets or the like which would enable it to exclude anyone from any phase of band manufacture. Alleged potential competitors denied they desired to enter the business, or ever were excluded.

Whatever may have been the technical reasons that persuaded plaintiff it should include a charge of band monopolization within its general attack, it is apparent the charge of monopolization is without foundation in fact or in law.

1771 *Conclusion of law*

The facts destroy the charges here made. There has been no monopolization or conspiracy or combination or attempt to monopolize shown. The record reflects not the dead hand of monopoly but rapidly declining prices, expanding production, intense competition stimulated by creative research, the development of new products and uses and other benefits of a free economy. DuPont nor any other American company similarly situated should be punished for its success. Nothing warrants intervention of this court of equity. The complaint should be dismissed.

Wilmington.
Dated December 14, 1953.

1772 In United States District Court

[Title omitted.]

Motion to strike

(Filed December 15, 1953)

Now comes the Defendant, E. I. du Pont de Nemours and Company, and moves the Court to enter an order in the form attached striking Exhibits GX2917, GX2918, GX564, and GX565 from evidence in this proceeding. The ground for this motion is that when said exhibits were received in evidence, the Court reserved to Defendant the right to move to strike in the event "no conspiracy has been shown" (see Paragraph 2 of 7th Trial Memorandum dated September 4, 1953).

Under the Court's Findings of Fact, Conclusion of Law and Opinion dated December 14, 1953, this motion is now appropriate.

Respectfully submitted,

MORRIS, STEEL, NICHOLS AND ARSHT.

(S) By HUGH M. MORRIS,

(S) COVINGTON & BURLING.

Dated December 15, 1953.

1773 In United States District Court

[Title omitted.]

Order granting motion to strike

(Filed February 23, 1954)

Defendant's Motion to Strike dated December 15, 1953, is granted and Exhibits GX2917, GX2918, GX564 and GX565 are hereby stricken from evidence in the proceeding.

(S) PAUL LEAHY,
United States District Judge.

Dated February 23, 1954.

1774 In United States District Court

Civil Action No. 1216

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DUPONT DE NEMOURS & COMPANY, DEFENDANT

Order dismissing the complaint, etc.

(Filed February 23, 1954)

The Court having on December 14, 1953, filed its Findings of Fact, Conclusion of Law and Opinion in this cause, it is hereby Ordered, adjudged, and decreed that the Complaint be and it hereby is dismissed, with prejudice.

(S) PAUL LEAHY,
United States District Judge.

Dated February 23, 1954.

1775 In United States District Court

[Title omitted.]

Petition for appeal

(Filed April 23, 1954)

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the twenty-third day of February 1954, does hereby pray an appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the asignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of

the United States under the rules of said Court in such cases made and provided.

(S) STANLEY N. BARNES,
Assistant Attorney General.
(S) JAMES L. MINICUS,
Special Asistant to the Attorney General.

Dated this 23d day of April 1954.

1776 In United States District Court

[Title omitted.]

Assignment of errors and prayer for reversal

(Filed April 23, 1954)

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on February 23, 1954, in the above-entitled cause, and says that in the entry of the final judgment the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in entering judgment dismissing the complaint.

2. The court erred in its conclusion of law that the evidence fails to show illegal monopolization of interstate commerce in cellophane.

3. The court erred in each of the following holdings:

(a) That du Pont's monopoly power respecting trade in cellophane is to be determined, not by its control of such trade, but by its control of "the market for flexible packaging materials."

(b) That du Pont lacked power to exclude competitors.

(c) That du Pont lacked monopolistic power to raise cellophane prices.

1777 (d) That du Pont's "monopoly" was "thrust upon it" within the meaning of the decisions construing Section 2 of the Sherman Act.

(e) That none of the exclusionary provisions of du Pont's agreements with foreign companies, Sylvania, or distributors of cellophane violate the antitrust laws or are otherwise unlawful.

(f) That du Pont's moistureproof product patent "represents a defense to the monopoly charge."

4. The court erred in failing to hold (1) that du Pont had effective market control of cellophane, (2) that it had been a party to numerous exclusionary agreements and practices contributing to

such control, and (3) that such control and such exclusionary acts constitute illegal monopolization irrespective of whether the exclusionary acts were predatory or technical restraints of trade.

5. The court erred insofar as it gave consideration, in passing upon the monopolization charged in the complaint, to Olin's entry into the cellophane business in 1951.

6. The court erred in finding that cellophane is not a unique flexible packaging material in any functional or economic sense, in finding that there is no cellophane market distinct and separate from the market for flexible packaging materials, and in finding that the market for flexible packaging materials is the relevant market for determining the nature and extent of du Pont's market control of cellophane.

7. The court erred insofar as it found that cellophane is fully interchangeable, functionally and economically, with many flexible packaging materials, and insofar as it found that other flexible packaging materials compete with cellophane upon the basis that they furnish substantially the same combination of qualities or properties.

1778 8. The court erred in finding that duPont's cellophane has not attained the bulk of the business in any use for which it is sold.

9. The court erred in finding that duPont does not have power to exclude others from the manufacture and sale of cellophane, and in finding that duPont has not suppressed the competition of any existing or potential competitor.

10. The court erred in finding that duPont does not have power to fix arbitrary cellophane prices or arbitrary and non-competitive terms of sale.

11. The court erred in finding that duPont has not achieved, and cannot exercise, market control or monopoly power as to trade in cellophane, and in finding that it has not monopolized such trade and commerce.

12. The court erred insofar as it found that purchasers of cellophane have adequate alternative sources of supply apart from duPont.

13. The court erred insofar as it found that duPont's 1933 license agreement with Sylvania did not provide for an exchange or pooling of patents.

14. The court erred in finding that duPont's agreements with foreign corporations and its 1933 license agreement with Sylvania did not restrain trade.

15. The court erred in finding that duPont's distribution practices did not tend to give it monopoly power.

16. The court erred insofar as it found that no restraint of trade contributed to duPont's position in the cellophane industry.

17. The court erred in finding that paragraphs 21, 22, 23 and 44 of the complaint are not supported by proof or the weight of evidence.

1779 Wherefore, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES,
Assistant Attorney General.
JAMES L. MINICUS,
Special Assistant to the Attorney General.

Dated this 23rd day of April 1954.

1780 In United States District Court

[Title omitted.]

Order allowing appeal

(Filed April 23, 1954)

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on the twenty-third day of February, 1954, and having also made and filed its petition for appeal, assignment of errors and prayed for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for.

RICHARD S. RODNEY,
United States District Judge.

Dated this 23d day of April 1954.

1781 Citation in usual form showing service on Gerhard A. Gesell [omitted in printing].

* * * * *

1784 Praecipe for Transcript of Record [omitted in printing].

* * * * *

1790 In United States District Court

[Title omitted.]

Stipulation for an order to certify and transmit original documents and order thereon

(Filed May 4, 1954)

It is hereby stipulated and agreed, this 29th day of April, 1954, by and between the undersigned counsel for the parties hereto that the court be requested to enter an order directing the Clerk of this Court to certify and transmit to the Clerk of the Supreme Court of the United States, as the transcript of the record on appeal, the original exhibits and portions of the stenographic transcript of testimony and trial proceedings designated in the praecipe and counter-praecipe, such other original papers as are so designated for which counsel have not provided copies, and all copies provided by counsel of original papers so designated.

(S) JAMES L. MINICUS,
Attorney for Plaintiff-Appellant.
(S) JAMES H. MCGLOTHLIN,
Attorney for Defendant-Appellee.

So ordered, this 4th day of May, 1954.

(S) PAUL LEAHY,
United States District Judge.

* * * * *

1795 Defendant's designation of additional portions of the record [omitted in printing].

* * * * *

1798 Clerk's certificate to foregoing transcript omitted in printing.

1799 In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 162

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS & COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Stipulation

(Filed February 11, 1955)

Whereas in the above case appellant has filed a designation, and appellee a cross-designation, of the parts of the record to be printed; and

Whereas appellant's designation includes the entire transcript filed with this Court (except the opening statements and closing arguments of counsel) and certain Government exhibits and defendant's exhibits, and

Whereas appellee's cross-designation includes (1) all Government exhibits filed with this Court which are referred to in the District Court's Findings of Fact No. 1 through 732 and 820 through 854 and which appellant had not designated for printing, and (2) all defendant's exhibits (except four) filed with this Court and not designated by appellant for printing; and

Whereas appellee believes that, apart from a stipulation by appellant as to findings of fact by the District Court which will not be attacked, the printing called for by the designation and cross-designation is necessary for the protection of its interests on appeal; and

Whereas both parties desire to reduce the size of the printed record insofar as this may be done without prejudice to their respective rights and interests;

1800 Now therefore the parties hereby stipulate and agree that:

1. Appellant will not attack as clearly erroneous or lacking adequate evidentiary support the findings of fact of the District Court (or parts thereof) listed in Schedule A attached hereto; but appellant reserves the right to question the relevance of any finding so listed and to argue that it is qualified by, or wholly or partly inconsistent with, another or other findings of the District Court.

2. The Clerk of this Court shall not print the exhibits listed in Schedule B attached hereto or the pages (or parts thereof) of the transcript listed in Schedule C attached hereto, all of which exhibits and transcript have previously been designated by the parties for printing.

3. The Clerk of this Court shall not print the plaintiff's proposed findings of fact, the defendant's proposed findings of fact, or defendant's brief on the facts and law constituting items 21, 22 and 23, respectively, of plaintiff's praecipe to the Clerk of the United States District Court for the District of Delaware.

4. Either party may, in its opening or reply brief, refer to any part of the record which has been filed with this Court but not printed for the purpose of showing the page at which an exhibit was offered or for the purpose of identifying any person mentioned in any portion of the record that is printed. In addition, either party may, in its opening or reply brief, refer to or quote any part of (a) the plaintiff's proposed findings of fact, (b) the defendant's proposed findings of fact, (c) the defendant's district court brief on the facts and law, and (d) the closing argument of plaintiff's counsel. Any part of the unprinted record quoted or referred to under this paragraph may be referred to in oral argument.

1801 5. The Clerk of this Court is requested to print this stipulation and attached Schedule A.

SIMON E. SOBELOFF,
Solicitor General.
GERHARD A. GESELL,
Counsel for Appellee, E. I. du Pont de Nemours & Co.

Dated February 11, 1955.

1802 *Schedule A to stipulation*

Findings (All references are inclusive):
1–6.
7 (except first sentence, second paragraph).
8–9.
10 (except first sentence).
11–16.
17 (except second sentence).
18–24.
26–30.
32–36.
38.
39 (except last sentence).
40.

42–55.
59–61.
62 (except last sentence under "*glassine*").
63 (except last sentence under "*glassine*" and third sentence under "Aluminum Foil".
64.
66–74.
76–79.
82–84.
86.
89–93.
95.
97–110.
112.
113 (except last sentence).
114–115.
116 (except last sentence).
117–120.
124–126.
128–137.
139–141.
143–148.
150.
152 (except second sentence).
153 (except last sentence).
154.
156.
159–161.
166–167.
172–278.
280–292.
293 (except first sentence).
294–297.
300–302.
303 (except first three sentences).
305.
308 (except last two sentences).
309.
311–318.
319 (except first sentence).
320–323.
326.
328–331.
335–337.
339.
340 (except last sentence).

342–344.
346–353.
367–368.
370.
372–373.
375.
377.
379–382.
1803 384–385.
389–393.
395–405.
408–409.
412.
414–418.
422–436.
438–442.
444–455.
460–463.
466–469.
472.
474–478.
481.
483.
484 (except first sentence).
485 (except next to last sentence).
486–489.
490 (except last sentence).
491–508.
511–517.
521–532.
534–536.
537 (except first sentence).
541.
547.
554.
555 (except last sentence).
557.
561.
562 (except first sentence).
563.
566.
570.
576–582.
584–590.
592.
594–595.

597–600.
602–604.
606–608.
609 (except last sentence).
610–613.
615–621.
623 (except last sentence).
624–626.
628–634.
636–642.
644.
650–651.
652 (except last sentence).
653.
655–659.
662–686.
688.
690.
694.
695 (except last two sentences).
701 (except first sentence).
703.
1804 706–709.
713–715.
717 (except first sentence).
719.
720 (except last sentence).
725.
821 (except second sentence)
822–824.
825 (except last sentence).
826–834.

1805-3298 Supreme Court of the United States

No. 162, October Term, 1954

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Order noting probable jurisdiction

(October 14, 1954)

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The motion to clarify and define the assignment of errors is denied.

Mr. Justice Clark took no part in the consideration or decision of these questions.

* * * * *

3299 In the United States District Court for the District of Delaware

Civil Action No. 1216

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DUPONT DE NEMOURS AND COMPANY, INC., DEFENDANT

WILMINGTON, DELAWARE, *January 17, 1951.*

Before Hon. PAUL LEAHY, Chief Judge, U. S. District Court

Transcript of trial proceedings

APPEARANCES:

For the plaintiff: William Marvel, Esq., United States District Attorney; James L. Minieus, Esq.; Julius C. Renninger, Esq.; Joseph F. Tubridy, Esq.; Philip L. Roache, Jr., Esq.; William J. McAuliffe, Jr., Esq.; Forrest A. Ford, Esq.

3300 For the defendant: Hugh M. Morris, Esq., and Alexander L. Nichols, Esq., of Morris, Steel, Nichols and Nichols & Arsht; Gerhard A. Gesell, Esq.; James H. McGlothlin, Esq.; David C. Acheson, Esq.; Harvey Levin, Esq.; George J. Kuehnl, Esq., of Covington & Burling, 701 Union Trust Building, Washington, D. C.; and Francis J. Zugehoer, Esq., 7098 Du Pont Building, Wilmington, Delaware.

* * * * * *

3446 *Offers in evidence*

Mr. MINICUS. Relative to statements made in the opening yesterday, I would like to refer at this time to page 5451, or page 23 of the report——

The COURT. Mr. Minicus, may I have your help for a moment?

Mr. MINICUS. Yes, sir.

The COURT. As you go through these various writings and read them, I find myself, Hamlet-like, asking myself questions, "What does it mean? What is the purpose? What about it?" Are you going to make a running commentary as to why you think this has some importance, because otherwise I could find myself nearing the state of exhaustion trying to find out what is the importance of it.

Mr. MINICUS. I had a debate with myself last evening about whether the best way to handle that would be to complete the reading in the report——

The COURT. You be an advocate and you say what you think that means and give me your version of it.

Mr. MINICUS. As we go through these subject matters, I will.

3447 My intention had been to complete the reading of the report only for the sake of the record. If I keep interjecting remarks, I was wondering whether the record——

The COURT. All I want is either in the beginning, before you make reference to the document, or at the end, that you give me your version of it so that it will be of help to me in fitting the mosaic into the picture as offered by the Government.

Mr. MINICUS. Well, then, I shall do it in this case at the end of my narration of the complete record.

* * * * * *

3453 Mr. MINICUS. There are times, your Honor, with these very old photostats where it is impossible to get an absolutely clear imprint.

As I mentioned at the beginning of my discussion of this document, it is intended largely to cover certain preliminary matters and present the background of what was actually going on. The

document was written contemporaneously with duPont's considerations of an entry into the industry. We do think, however, that this document does set forth a basis for certain pertinent facts.

Under the heading of "Foreign Relations" that I read originally we will note that already the parties are beginning to talk in terms of a circumscribed territory. There we see that the dealing is for the acquisition of the cellophane rights for North and Central America.

Under the heading of "Patents" several facts are quite apparent from what I have said. One is that at this time there had been patents on cellophane which had already expired, showing that we were dealing with a rather old art here. In the second place, that at this time in the United States, by duPont's
3454 own admission, there were no United States letters patent sufficient to give them even a scintilla of protection from potential competition. Thirdly, I invite the Court's attention to the very concept in which the duPont Company in this report is thinking about patents. We can see that at this early stage their entire thought of patents is as an offensive weapon, something to give them means to anticipate the entry of new competition into this industry. It is replete in all those statements that I have read.

The COURT. Do you contend the desire to acquire a patent in order to lessen your competition is something violative of law?

Mr. MINICUS. I do not, your Honor.

The COURT. I haven't got your point.

Mr. MINICUS. I said that the attempt to acquire a great many patents—our proof will develop that—this is only initially—the attempt to acquire a great many patents of rather trivial substance, and using those patents almost as a unitary force, for the purpose of frustrating the development of new competition in an old art certainly establishes an intent to monopolize the industry.

My statement is addressed to the rate of return which was then anticipated, and will be carried forward in other evidence to be produced at a later point of this trial. We simply want to show that at this time the people of the duPont Company on their
3455 best estimates, as I read them, thought in terms of a rate of return in excess of 30%, and that is in direct contradistinction to the statements that were made yesterday addressed to the high risk in entering this industry.

The other points brought out in the course of the reading of the report were simply to indicate that at this time there were importers in the United States who had been bringing cellophane for several years in from Europe and selling it to buyers in this market.

Mr. GESELL. Did you say importers?

Mr. MINICUS. Importers of cellophane.

The recommendations, I believe, speak for themselves, and my mention of the tariff was simply to establish a basis for evidence that will be later on produced.

Turning now to Government's Exhibit No. 1——

Mr. GESELL. May I inquire how are we going to proceed, your Honor? Here is a long document of many pages. Isn't this the appropriate time for me to discuss it?

Mr. MINICUS. The supplemental pre-trial order undoubtedly provides for Mr. Gesell to have an opportunity to place his interpretation on the documents. I think the only question is whether we can finish a subject matter before Mr. Gesell discusses it.

Mr. GESELL. How many more do you want to go on to? Do you want to discuss just one other one?

Mr. MINICUS. Well, that is what I informed you last
3456 night. In other words, whether we finish a subject matter before Mr. Gesell gives his discussion—I admit here we have a slight departure from what we will have later, because there are introductory documents and they do not exactly form a cohesive unit.

The COURT. You have gone into Plaintiff's Exhibit No. 392 and you are going to take up Exhibit 1?

Mr. MINICUS. That is correct.

The COURT. Then it is your plan that Mr. Gesell will have an opportunity to make such comments as he desires on those two documents?

Mr. MINICUS. That is my plan.

The COURT. Thereafter you are going to proceed according to your scheduled blueprint, and as we finish a subject then you are going to let Mr. Gesell make whatever comment he wants to with respect to it. I think it would be better with the subject technique, even if we take up each document seriatim.

Mr. GESELL. I think so, too. We will take groups of documents. In some of these subjects there are so many that we may want to break it in two or three places.

The COURT. Let me suggest this: let us try to keep our procedure resilient enough so that whenever you think it is time for clarification of the positions of the respective parties with respect
3457 to any particular group of writing, you arise and ask permission, and we will proceed on that basis.

Mr. GESELL. That is fine, your Honor.

Mr. MINICUS. May I suggest, then, that inasmuch as the next document is quite a departure from the previous document and the

subject matters are quite varied in the previous document, I think it would add to clarity if Mr. Gesell took over at this point.

The COURT. All right. This is something in the nature, I suppose, of a quasi-cross-examination of a writing.

Mr. GESELL. Unfortunately, that is all I can get to grips with, your Honor. We don't have any live witnesses in this case and we are not going to have any on the plaintiff's case. The only witness they have called is their own economist.

Dr. Sparre, the author of this document, is dead, your Honor.

The first point I want to make is that we have jumped into the middle of the case. We have not started at the beginning. The proper place to have started would have——

The COURT. If you will bear up under it, I will try.

Mr. GESELL. Well, I will bear up under it, your Honor, but you won't mind my pointing it out as we go along?

The COURT. No.

3458 Mr. GESELL. The proper place to have started would have been the option, Exhibit 1458, because this document is written in the context of a written contract already existing between the parties. The suggestion that we are maneuvering around to consider certain things is not correct, because we already were contracturally bound by the contract that I guess Mr. Minicus will come to in due course. Your Honor may want to note on his copy, however, that the start of this is Exhibit 1458.

There had been some investigation of the process before this.

3459 The next point I want to make about the portions which were dealt with is this. This document is dated in April, 1923, and it is concerned with plain cellophane. Moistureproof cellophane was not yet even a gleam in the inventor's eye in 1923. As your Honor knows, the patent on moistureproof didn't issue until 1929. So that all this discussion about patents concerns a group of patents relating to plain cellophane, a product which, as your Honor is aware, is today of very little consequence; it accounts for only about 15 percent of the production.

The next question that I should think would be important is What did duPont do with these patents? Did it acquire some patents which the documents suggest some of his people felt weren't particularly strong or inclusive, and did it enforce them against anybody? Mr. Minicus' own documents, which we will come along to, will show that these patents were never the subject of any litigation, never enforced against anybody, and when a new competitor came along they were not asserted. So the overtones that are suggested from the document to you that in some way patents were being improperly exploited by duPont will not come forward in the evidence.

One reason, your Honor, that I would have liked to see a start at the beginning is that the option agreement, you will see when we come to it, indicated there were doubts about the strength
of the patents. That was one of the issues that wasn't
3460 resolved. A tentative evaluation of $100,000 was put upon
the patents and when we found from our subsequent studies, of which this is one, that they weren't worth much, the French did not get credit for the $100,000. So that in working this matter out, as a business matter, when it appeared that the patents were not of any particular value, we refused to give them any value in our arrangements with the French, and they had to take the corresponding penalty, which was contemplated in the initial business option that we will come to, I guess, in due course. These patents were never used as an offensive weapon. The documents show they were never the subject of any litigation and never asserted against a new competitor.

The next point—I am still dealing with the points that the Anti-Trust Division sees in the documents—is the suggestion that we weren't a pioneer. Well, I thought it was clear that we were the first to manufacture in this country, and there is nothing in this document that suggests the contrary. We musn't let this discussion of the patents cloud the fact that the document also shows the extreme importance of the know-how. At one point in the document we did have read a brief phrase that pointed to the importance of the know-how on page 5455, "It is quite true that the value of the know-how is exceedingly important." But over on page 2, at 5430, which was not read to your Honor, is this significant passage:

"In the event that the duPont Company should elect
3461 not to exercise the option it cannot for a period of five years
make use of any confidential information obtained during the investigation of the French plant * * *" and then this interesting statement, "* * * which would be equivalent to preventing the duPont Company entering the manufacture of a product of the cellophane type for a period of five years from the date of expiration of the option agreement."

In other words, duPont knew no way to make cellophane that did not infringe the confidential information, the secret process information, the know-how that it obtained under the contract. And there is nothing in this document except support for our contention that the know-how was confidential, that it was secret, that it was essential to manufacture, and that the French had it.

Now, your Honor, I would like also to discuss some aspects of the document which were not called to your attention, in addition to that relating to know-how. The first is our contention with respect to the market. It is interesting that the very first exhibit

that the Government should come forward with is dramatic support for our contention as to the market. If you will turn to page 5455, you will see a discussion there that runs a long for several pages about competitive articles, and without reading the entire text to your Honor, you will see that duPont envisaged
cellophane as a packaging material, wrapping material as
3462 it was called, and it speaks of the fact that gelatin, tinfoil, glassine paper, are being sold in enormous——

Mr. MINICUS. Your Honor, I have an objection at this point. The materiality of the subject matter that Mr. Gesell is now discussing is very much in doubt in this case. Admittedly we have offered the document, but not for this purpose. Mr. Gesell at this stage by adopting this part of the document is treating it as his own witness, and we are objecting on the grounds that he is introducing evidence that is immaterial to the issues of the case.

The COURT. Well now, let's get that straightened out in the beginning. Is it your thought, Mr. Minicus, that if you offer a document of ten pages and you take—we will take the odd numbers—1, 3, 5, and 7 that you think is in support of your case, that therefore I am not to look at the rest of the document?

Mr. MINICUS. That is not my position at all.

The COURT. Then is it that Mr. Gesell is not to be permitted to point out to me what pages 2, 4, and 6 show?

Mr. MINICUS. If pages 2, 4, and 6 are material to the issues of the case.

The COURT. They are not only material, they apparently are vital to his case.

Mr. MINICUS. To his case, your Honor.

The COURT. That is right.

3463 Mr. MINICUS. That is correct. But we haven't reached the point where the issues——

The COURT. Let me ask you this, to advert to the matter I spoke about a moment ago, that these are silent writings. If we had a witness on the stand and he was testifying concerning the matters referred to in this report, could there be any doubt but that Mr. Gesell could cross-examine him on the subject matter of that report once it had been opened up for discussion?

Mr. MINICUS. I don't believe that he would be permitted to examine him on matters that were completely irrelevant to the issues. We have attempted to achieve a determination of the relevancy of this at pre-trial, your Honor, and Mr. Gesell opposed the relevancy——

The COURT. When you use the phrase "relevant to the issues" do you mean relevant to your issues or relevant to the issues that the Court has to decide?

Mr. MINICUS. Well, there has been no decision on it yet, your Honor; it is a matter of contention at this moment.

The COURT. Well now, I will ask you one further question, not by way of being forensic about it, but I want help. How is Mr. Gesell then to bring out this material? How is he to bring this out?

Mr. MINICUS. We believe that this entire matter—we have held from the beginning that this entire matter of other products
3464 in competition with cellophane and with caps and bands is a matter of affirmative defense. Therefore if he is to bring it out, these documents are available to him and he may bring them out in the establishing of his affirmative defense.

The COURT. Then what we come down to is this. Your objection goes to the order of proof. Does it mean that many months hence I have got to come in here some morning and look at page 5435 and go over it all again with Mr. Gesell?

Mr. MINICUS. If we cannot have some determination, your Honor, at some time concerning the materiality and the relevancy of this very important subject matter, a great deal of material is going to be brought into this case that may not be necessary to it. The problems surrounding the market for kraft paper and wax paper and all these other things we have been talking about—I think bottles were excluded—is going to bring in a tremendous amount of evidence. That is why we have been urging from the beginning that there should be a resolution of this issue. But we certainly don't think it is a part of our case. It is a matter of affirmative defense and it should not be established during the course of our case in chief. There is a time in the trial that has been provided for complete argument and resolution of this issue, and I don't think that it is proper evidence to come in on it before that issue is concluded.

The COURT. Let me ask you this, Mr. Minicus. Assuming
3465 that we were to finish the Government's case today, for example, would there be any doubt in your mind that Mr. Gesell could look at this Exhibit 392 and could point out to the Court the various subject matters referred to in that report in support of his motion that you have not sustained your case? In short, isn't this writing available to him as much as it is to you?

Mr. MINICUS. As to the material parts of it. But we haven't determined——

The COURT. But why should you be permitted to select what you consider to be material parts and silence Mr. Gesell? Why should he be silenced?

Mr. MINICUS. Your Honor, you have already adverted to these documents as silent witnesses.

The COURT. That is right.

Mr. MINICUS. In my examination of a witness on oral testimony——

The COURT. If you would hand a witness this written document, that opens for cross-examination, it appears to me, anything contained in that document.

Mr. MINICUS. Shouldn't that, your Honor, I respectfully submit, be limited to matters relevant to the issues? And we haven't determined yet whether this subject matter is relevant to the issues.

Now, if I put a witness on the stand and he would have in his general information some matters material to the
3466 issue and some matters completely immaterial to the issues, I could not cross-examine him on matters that were not relevant to the issues, that is, examine him, nor could Mr. Gesell cross-examine him on immaterial matters.

We will probably have this trouble, your Honor, because it is impossible to take these documents and select out of them the matter that we consider immaterial. This problem does run through the documents, and unless we can make a determination and limit it to the evidence and settle it at the time that was agreed between Mr. Gesell and myself, it is going to continue to arise.

We would like to make a limited offer of these documents until the time arises that we have set for a resolution of this offer, the limited offer being to be able to exclude maters that we consider to be irrelevant to the issue.

I might state, your Honor, we have already done that in our own case. We have documentary evidence that is opposed to Mr. Gesell's position on this matter because we felt that it was not——

The COURT. Well, if you are correct, you never have to use that.

Mr. MINICUS. That is why we have withdrawn it. We have withdrawn those that we can withdraw.

The COURT. Well, it doesn't seem right to me that if you look at a writing and you urge it upon the Court and
3467 ask the Court to examine it and read it and then say, "But we only want you to read the parts that we are interested in, Judge; we don't want you to read the rest of it,"—I have not arrived at a conclusion yet, but that just doesn't seem right to me.

Mr. MINICUS. That is not our position, you Honor. We want the Court and everybody in this case to read and consider every fact in every document that we put in that is relevant to the issues——

The COURT. That is where my trouble commences, when you use the word, and I put it in quotation marks, "the issues." The issues according to whom? You?

Mr. MINICUS. Well, that is what we have been trying to get a determination on, your Honor. We contend that the Government

here has alleged a monopoly of the manufacture and sale of cellophane. The defendant has come forth and said, "Well, that has nothing to do with the fact. Whether they are manufacturing and selling 76 per cent of the cellophane makes no difference."

The COURT. Well, what you are asking me to do, if I am to determine this thing called the issue, I am deciding the case right now, without hearing any facts at all. You are saying, "You can't talk about wrapping paper, Mr. Gesell, wax paper, and all the other things." To accept your terms, Mr. Minicus, I am pretty well far around the track, it would seem to me.

3468 Mr. MINICUS. Would he not have an opportunity to present all this matter when his right to establish that affirmative defense was determined?

The COURT. Right now at that point when is he going to have the opportunity to dilute as much as he cares to your case? Do we have to sit here and listen to your case and sit here and listen to his case? Why doesn't he have the right in presente as you go along to water and dilute the effect of your ammunition as much as he wants to? That seems to me to be the orthodox technique which lawyers always use in cross-examination. In other words, they want to say with regard to the testimony which is coming from this witness, or the testimony which emanates from this document, "I want to show that it doesn't mean quite exactly that," or, "At least that is not the whole story," et cetera, et cetera.

Now, let us pose our problem another way. Put this Exhibit 392 acide for a moment. Suppose you go through your category of defendant's foreign relations and Mr. Gesell sits quietly for two or three days while you put this evidence in, is it your thought that he cannot make such comments as he desires on those written documents after you have finished with that subject matter, in order to give the Court his view as to what that document shows?

Mr. MINICUS. Not at all, your Honor.

3469 The COURT. Well, if he can do it with the whole category, why can't he do it with 392 which we understood, while it isn't the beginning of the drama, it fits into the picture some place, and he now says, "I want to show what I think about 392 by referring to matters therein contained," which he says, "This helps my case."

Mr. MINICUS. If I may present my position on that, your Honor, there has been a time set in the schedule of this trial for a determination of whether the particular matter that Mr. Gesell is dealing with here is material and relevant to the issues or not. I submit to your Honor that after the determination is made, if it is made favorable to the plaintiff, he will not be permitted to introduce that evidence. Therefore I don't think it is right to permit

him to introduce that evidence before the determination has been made and before we have had a chance to show its immateriality.

The COURT. He is not introducing any evidence. He says you are introducing the evidence but he wants me to look at the last two pages. It is your evidence, not his. It is your exhibit. 392.

Mr. MINICUS. Might this be offered as a satisfactory solution to this. Would your Honor permit us to make a conditional or qualified offer of our documents——

The COURT. You mean you want to offer your own documents reserving the right to yourself to strike some of it?

Mr. MINICUS. Reserving the right to have part of it
3470 withheld until such time as the determination of the relevancy of that part is made. In other words, we would like to make a qualified offer of these documents, only as to that one issue.

The COURT. You see, the reason that we talked at pre-trial about reserving questions of materiality was that you couldn't expect any human being to sit up on this bench and on the first or second day of the trial, say, "I think this is material. That is immaterial. This has to do with the issues. That has nothing to do with the issues," because I haven't got the picture of what this case is about, and I cannot decide questions in vacuo, and that was the reason, if my recollection serves me right, that we said I would postpone these questions on materiality.

Now you come forward and say I have got to determine that question of materiality before I can hear whatever comments Mr. Gesell wants to make on your evidence as it comes in. I think we are at an impasse. We have got to evolve some procedural approach to this thing. I don't know the answer, unless you want to sit down and we argue materiality as we go along on each document. That is going to be a cumbersome procedure.

Mr. MINICUS. I think that would be very cumbersome and I think it is only going to arise as to this one issue, your Honor, and this is the issue that the plaintiff urged strongly at pre-trial, that Mr. Gesell opposed. Now, because we were not able to carry through on our own views, we are the ones that are
3471 being prejudiced.

The COURT. Oh, you have not been prejudiced by what he told me this morning on his arguments as to what they show.

Mr. MINICUS. A great deal more of this is coming up, your Honor.

The COURT. I thought you said this was the only one?

Mr. MINICUS. This isn't the only document; it is just this issue.

Mr. GESELL. All through this documentary case of the plaintiff, your Honor, there are documents that support our contentions

with respect to the market, and I intend, with your Honor's permission, to point them out because they demonstrate on their face, these documents that the plaintiff has offered, that they are trying to put forward a tailor-made idea of this business. They want to exclude from your observation on their case the facts as to how cellophane is sold, what the competition is, and I am entitled to bring those facts out on documents that they have offered. And this is in evidence, as I understand it. It is just as though a witness had testified to this heading, "Competitive Articles."

Mr. MINICUS. I don't want to exclude anything, your Honor. I would just like to point out that the Legislature of the United States has already excluded that material when it said in part in the statute, to monopolize any part of the commerce, and I
3472 also want to point out that every court that has interpreted that has interpreted it to mean in accord with the position we are taking in this case, that secondary competition on materials that can be used as substitutes cannot report into the trial of an anti-trust case, under monopoly. Mr. Gesell admitted, using his own case, the Columbia Steel case this morning, that the Supreme Court there determined that these other types of things could not be introduced to show a dilution of the defendant's market, and it has been held in case after case.

The COURT. You used the phrase "secondary competition." As I understand the theory of the defendant's case, it is primary competition. That is where he says the distinction lies.

Mr. MINICUS. I also said, and substitution materials.

3473 The COURT. The three of us have got a problem. How are we going to get the case going along? Let us see if we can——

Mr. MINICUS. May I suggest, your Honor, the possibility of holding this matter in abeyance? I don't think it will come up beyond this document before the recess.

The COURT. What do you mean, 1:00 o'clock?

Mr. MINICUS. No, I mean the recess in February, the two-month recess.

The COURT. Oh, yes.

Mr. MINICUS. Would it not be feasible, perhaps, your Honor would have an understanding of the issues sufficiently at that time to hear argument on materiality during the two-month recess of this case. It is then perhaps that a logical solution of our problem will be found, because, as I said, the subject matter that is coming up now probably will run through to the recess, and will not, I don't think, involve any documents bringing this matter in.

The COURT. What about it, Mr. Gesell?

Mr. GESELL. I don't think that is exactly what the situation is going to be. I don't know how far he is going to get by February 9th. I hoped we would be well along in the case.

The COURT. But this statement that this document, which is a wonderful document to start off with, No. 392, 3474 Mr. Minicus says after we finish with that he doesn't think our problem will arise. Certainly this 25-minute discussion has brought into sharp emphasis the point you make about competitive articles. They are in here. Do you want to talk any more about them?

Mr. GESELL. Well, I probably have made my point on this exhibit if your Honor will mark those pages as things that should be read.

The COURT. Well, I intended to read all the pages, Mr. Gesell.

Mr. GESELL. Well, I do have a feeling your Honor will read with particular care what we call to your attention.

The COURT. I will mark this with a red pencil and an arrow. I think I am going to give some thought to your suggestion, Mr. Minicus. I think that is the way we ought to handle it, so by the first recess, then, we will meet squarely this question, your definition of what the issue should be and Mr. Gesell's definition of what the issue should be.

You disagree, I suppose, with Mr. Gesell that this case is sui generis. You say there are hundreds of cases like it—not hundreds, but other cases like it.

Mr. MINICUS. I attempted to make that quite clear in my opening statement, your Honor, that we are depending on the precedent cases to support our position in this case.

3475 The COURT. All right. Tentatively, after we arrive at the first recess period, we will then have argument citing the apposite legal authorities on the question as to what defenses in this case are available to the defendant.

May I make this observation in passing: that this case is becoming more complex due to the fact that the defendant has served notice that it is going to move to dismiss the plaintiff's case and ask for judgment in its favor when you are finished. That means that according to the present schedule the defendant will contend at some later date that the Government has not made out a case on the basis of its evidence. This is the problem which is giving me difficulty which I am now about to announce: Should the defendant, with that in mind, have the right to refer to documents which you are using to support its motion? You say no, that is an affirmative defense and that should not be utilized in support of their argument to render judgment against you.

Mr. MINICUS. That is my position, sir.

The COURT. I think that is the problem I have to decide. Can I utilize materials which are in these written documents against you without the defendant putting in its case at all? In lay language that is what it means. I don't see how I am going to settle that matter in a legal fashion until I determine relevancy and materiality, and I have to meet that question.

Now, how do you want me to meet it? Do you want me
3476 to meet it now, or, you said, at the end of the first recess? Do you have any suggestions, Mr. Gesell?

Mr. GESELL. I would just as soon meet it now, your Honor. I am prepared to argue it this afternoon.

Mr. MINICUS. Following the pre-trial order, your Honor, we had not expected to meet this issue until the conclusion of our case. Therefore our lack of preparation to meet it with the real care that will be necessary to it is excusable on that ground. We felt that we could use the period during the recess, or part of it, for the preparation of that. We have been quite busy up to now preparing our case in chief, and we thought that matter would not arise until we had concluded the presentation of our own case and the defendant had argued its motion to dismiss. So we think the matter involved sufficient case law and legislative law for enough recess to give us a little more time on it.

The COURT. But the point is you are the one that brought this up this morning. Do you want to withdraw your objection and then as we reach the first recess period move to strike any materials that Mr. Gesell has referred to, or move the Court to disregard those portions?

Mr. MINICUS. I think that would be the most satisfactory method for us.

The COURT. That is the closest I can get to a solution.

* * * * *

3479 The COURT. Quite frankly, Mr. Minicus, would you rather that I refrained from my questions? Or interrogate you as I go along?

Mr. MINICUS. As a matter of fact, I appreciate your questions very much. I think they bring out a great deal that the mere reading of these things sometimes loses expression, and it is difficult to maintain it, and points might be missed that your Honor would not completely see that may be helpful.

The COURT. All right.

Mr. GESELL. Is it really necessary to read 17 pages of closely written print?

The COURT. Well, you asked me the question is it necessary. I don't know.

3480 Mr. GESELL. I don't feel I should object, but I had hoped there was a shorter way to proceed.

The COURT. As I told you gentlemen in pre-trial, I have an oriental resignation about this case. I don't know how long I am going to be here and I will listen to 17 pages—that is, I will try.

Mr. MINICUS. As the case continues, your Honor, and the basic detailed facts of the case are in mind, I assure your Honor it is our plan to reduce the reading and direct attention merely to certain points. But we feel to get a clear understanding of this, it is at this stage necessary to read in some detail.

* * * * *

3530 FRIDAY, JANUARY 19, 1951, 10:30 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. Your Honor will recall that yesterday the plaintiff considered the basic agreements under which duPont entered into the manufacture of cellophane in the United States. These agreements are very fundamental to everything that follows in the evidence, your Honor, and I think basic to the case not only from a factual point of view, but basic in many ways in applying various legal principles from the cases as we go along, and I thought the best thing I could in commenting on those various contracts was to develop chronologically what happened step by step. My purpose, your Honor, is to make it clear that this was a straightforward business arrangement concerned with domestic manufacture of cellophane. These agreements have been presented to you under a very misleading title. They are called "International Understandings" and are the kick-off for what the Government calls "Defendant's Foreign Relations"; but basically these agreements are agreements establishing a joint venture in the United States for the manufacture of cellophane in the United States and for the sale of cellophane in the United States.

3531 We have it in the evidence from Exhibit 1 that as early as 1919 the Development Department investigated rayon abroad and at that time became aware of preliminary developments in cellophane and got some samples of the new product which the French were working with.

In 1919 and 1921, as Exhibit 1 also shows, duPont and the Comptoir formed a company in the United States called Du Pont Fibersilk Company for the purpose of manufacturing rayon. A plant was set up in Buffalo. The French had stock in this company, participated in its management, and the company was successful.

The first contract we come to in chronological sequence is the option agreement, Exhibit 1458, in Volume 36. That option agreement, if your Honor please, requires a bit more anaylsis than it was given yesterday because it contains the terms which the French insisted upon when we sought to obtain the rights to their commercially proven process to manufacture in the United States. That agreement, your Honor will recall, is dated January 6, 1923. It is basic to an understanding of everything that followed.

First, it provided—and the French insisted upon this—that the French should have a stock ownership in the new enterprise. That is in paragraphs 4 and 5 of the option arrangement.

Next it provided in paragraph 4 for cash contributions by both of the parties to the venture. DuPont was going to put
3532 cash into the enterprise, and the French were going to put cash into the enterprise.

The territorial limits of the venture were also set forth. You will find those as well in paragraph 4. This was to be a concern, if duPont took up the option, which would manufacture and sell in North and Central America. That was the basis upon which the partnership was formed and a venture established.

3533 There were other provisions, your Honor, all like these, ordinary, logical, necessary, business provisions when two people come together to establish a partnership or venture to manufacture a product.

The French were required in paragraph 12, for example, to give engineering assistance, and of course it was provided in paragraph 9 that the French would not compete with their own company. They were going to go into this venture with duPont, putting their cash into it, putting their engineering skills into it, putting their secret processes into it, and that was their vehicle, that was their venture for manuacture in the United States, and the agreement provided as a natural business ancillary condition that they wouldn't compete with their own company.

Also it was provided, in paragraph 8, that if they continued to sell into this country—and that was specifically contemplated by the agreement—that the new company would act as the agent to handle the sales of their product, as it did until local manufacture started.

I want to stress to your Honor that at this time La Cellophane was importing into the United States; nobody else was. Their cellophane was coming in here. There was no business here at all of local manufacture, and duPont, interested to pioneer and start a manufacturing venture, joined with the Frenchmen
3534 who had the necessary secret processes and skills. This was not an agreement concerned with international understand-

ing; it was an agreement defining the venture and the business basis upon which it was to proceed.

Finally, if your Honor has any doubt as to the nature of this undertaking, I direct your attention to paragraphs 10 and 11, which I will discuss in more detail when we come to the operative agreement, which provided that the French should have substantial control in this venture. Not only did they have 48 per cent of the stock, but it was provided that many important managerial decisions would not be made without a vote of 75 per cent of the stock. And it was provided that they would have directors on this enterprise and that the vote of those directors would be required before certain undertakings could be made. No clearer proof of the joint character of the venture is conceivable.

Now, in judging the purposes of this agreement, your Honor, we have just the agreement. There are no surrounding documents at all. We have just the agreement. And I ask your Honor, does not that option demonstrate a practical business approach to a business problem? You may wish to note that it was approved by the lawyers both for duPont and for the French, they being represented by Mr. Paskus, a distinguished New York lawyer, partner of Joseph Proskauer, whose name you will see subsequently in many of the documents.

3535 The option provided, as any natural business understanding would, that before duPont took it up it would have an opportunity to look into this process, to see the patents, to see the plant in operation, to find out what its manufacturing costs were, what were its efficiencies, what were its potentials. And that is the next thing that happened.

Mr. Spruance, who negotiated the option and who unfortunately is dead, your Honor, and others went abroad and studied the French process, went into the plants, and saw what it was and how it worked, what made it tick, what its possibilities were, and that is what led to the next exhibit in the chronological sequence, 392, the Development Department Report of Dr. Sparre, which was discussed yesterday. And you will recall that that Development Department Report recommended, with certain conditions, that the option be taken up. By this time duPont had seen the secret processes of the French and had learned of this essential know-how which the report shows was essential to manufacture, and the decision was reached to go forward with some modifications after the matter was presented to the Executive Committee of the company.

3536 The next agreement was the actual agreement taking up the option, Exhibit 1001 in Volume 8, which was also discussed by Mr. Tubridy yesterday. That contract closely followed the terms of the option. It provided for the capital contributions,

for the stock ownership, for keeping the information secret. It defined the scope of the venture; it required the French to give the engineering assistance and it carried out the basic principles of the initial option.

If your Honor will turn to page 995 of that exhibit, which is page 10 of the exhibit, Exhibit 1001, in Volume 8, you will see with what close attention this new separate corporation was set up on a basis which preserved the rights of the two members to the venture. There are the provisions for the 11 directors, provisions that 75% of the common stock was required in connection with bonded indebtedness, encumbrances, and new capital; and later other provisions saying that the stock could not be increased without the vote of both shareholders. In all of the detailed corporate papers as they are summarized there on page 10 the rights of the two parties to the venture were carefully preserved.

This corporation was formed, your Honor, pursuant to this agreement. That is the Du Pont Cellophane Company. duPont put in—and I think there was some confusion yesterday about these dollar figures, and perhaps your Honor will wish to note them—duPont put in $866,667. The French put in $183,-
3537 333 in cash. Their secret process was valued at $246,666, and the patents at $100,000, making their total $579,000. We saw yesterday that the patents on subsequent analysis proved to be of so little substance that that $100,000 item was regained by duPont through dividends on the shares before the shares were made available to the French. The secret process and commercial operation of the plant were valued at $246,000.

This corporation was a distinct entity, your Honor, the Du Pont Cellophane Company. Its offices were set up in Buffalo where the rayon company was functioning. The French directors, three of them, were residents of the United States. They participated in the management of the company. In fact, I think many of the directors' meetings, as the documents show, were held in the offices of one of the directors in New York City.

As soon as the corporation was set up a license agreement was entered into, and that is the next of the basic agreements, Exhibit 1002, the next one in this volume 8, which licensed the new company, the Du Pont Cellophane Company, exclusively for North and Central America under the French processes. That merely carried out the business understanding in the option and the business understanding which was again repeated in the agreement setting up the corporation. Mr. Tubridy referred to that yesterday as an arm's length transaction, but of course it was a license
3538 agreement between the French and a company in which they had a 48% interest and a substantial participation in the management, which was the point I tried to make at the time.

The COURT. Quite frankly, I haven't got the significance of the point urged by either counsel on that particular fact situation. What importance has it?

Mr. GESELL. Well, I gathered that the Government's position is that the license agreement was in some way entered into to conceal or misrepresent the understanding, and they are trying to talk along those lines, which I don't so understand. I thought it was a simple, straightforward license agreement, and I gathered they were arguing arm's length in an effort to further that argument.

The COURT. Let us pass the matter.

Mr. GESELL. It was the carrying out of the option arrangement, your Honor, in accordance with the understanding.

Those were the basic agreements, and Du Pont Cellophane Corporation continued as a separate entity with the French on the Board, functioning as a separate organization until July, 1936, and the terms of these agreements were complied with. A plant was built. Dr. Brandenberger, the Frenchman who had invented the process, came over and helped build it with French engineers, and manufacture started, all precisely in accord with the business objective that these documents so clearly set
3539 forth when they are analyzed in chronological order.

Now, the Anti-Trust Division stated on the opening, and has stated again yesterday, that these agreements are illegal. They say they don't have to prove they are illegal, but anyway they are illegal.

The COURT. Could I interrupt at that point? This is the third day and I have been wanting to ask this question since Wednesday morning. If I might interrupt you I would like to direct it to Mr. Minicus.

Mr. GESELL. That is perfectly all right, your Honor.

The COURT. It is this: In point of time when did the defendant commence to show the stigma of violation of the Sherman Act?

Mr MINICUS. The seed of the idea, your Honor, we maintain, existed at the moment the first agreement was conceived dividing the territories between the United States and France. Our contention is that without patent protection the French in 1923 were claiming the entire world as their exclusive domain.

The COURT. If they were the only ones in the field, is that conduct subject to criticism?

Mr. MINICUS. Not if they were the only ones in the field. It wasn't very long before others began to enter the field, within two or three years, and that attitude persisted after the entry of Wolff and Sidac and others into the field.

3540 The COURT. I am not challenging your contentions, Mr. Minicus; I am just trying to bring them into focus so I can keep my eye on the theory of the case.

Mr. MINICUS. I most certainly desire to do that, too, your Honor. Now, duPont had previously had relations with the French in establishing a rayon plant that used very similar processes as the manufacture of cellophane up to the point of extrusion. The processes were not particularly secret. Sidac, when they broke into the market, had no difficulty starting their own processes. Cellophane had been known for over twenty-five years at that time.

3541 The COURT. Just a minute. I didn't mean to invite a long discussion. All I wanted to know was whether I can look at GX–1001 and GX–1002 and say, this is the beginning of the drama, right?

Mr. MINICUS. The first step in allocating world markets began at that time and it is the allocation of world markets we say is illegal.

The COURT. Now, as opposed to that, Mr. Gesell, in order that I can set my eye on the issues as you see them, you say these were bona fide orthodox methods of entering into a business enterprise in a pioneer field?

Mr. GESELL. Yes, your Honor, and may I just go a bit further on it. We say that the limitations, such as the French not competing with their own company, were reasonably ancillary to the undertaking, and that these contracts taken as a group are lawful and proper contracts, and that the limitations derived from the joint venture concept itself and from the licensing of secret commercial operating techniques and know-how and processes which the Government's own Exhibit 392 has now established were essential to entering upon this manufacture and which under the contract were kept secret.

Now, I would like to have, if your Honor does not feel I am pressing too much, a more precise statement from the Government as to why these contracts are illegal. The reference to, this

3542 wasn't secret information, is a matter of proof that has not been proven. But looking at the contracts themselves, does the Government concede that as business documents they are lawful documents within their four corners? And I think we are entitled to know that fact, if your Honor does, so that we may sharpen that issue, since this is really at the outset of the venture.

The COURT. Well, I think the inquiries I have put so far in the case, and especially this morning, give me the information that I desired. I am afraid if I grant your request at this point, Mr. Gesell, that every bit of evidence Mr. Minicus will put in, you will say, "Now, what does this mean? What do you rely on with reference to this document? How much weight do you put behind it?" And we would be here for an interminably long period of time.

So I think perhaps as a matter of procedure, I don't think I am going to accept the technique of having counsel ask one another questions. It may be efficacious under certain circumstances, but this little incident this morning is the thing I was after. I am satisfied. I have the information I sought. I know the theory each side has with respect to it as to these basic documents. So I would rather go on, if you don't mind.

Mr. GESELL. Certainly. I have concluded, your Honor.

The COURT. What is your next exhibit, Mr. Tubridy?

Mr. TUBRIDY. Your Honor, I would like to call your
3543 Honor's attention to the opening remarks which I made yesterday before I started to introduce those basic documents into evidence. I pointed out that they provided the modus operandi by which this world allocation of markets, this division of markets, was built up, and gradually it will unfold showing how these various cellophane companies of the world came into it, so it ended up with every cellophane company in the world involved in this entente cordial between all of them in which the world markets were divided, clearly under the case of United States versus National Lead. And a document may appear to be innocent on its face—it may not be—we are not arguing that point with regard to the basic agreements. I think we can establish that under paragraphs 4 and 5 the French were very careful there to——

The COURT. Well, I have passed that, Mr. Tubridy.

Mr. TUBRIDY. To allow an opening so that they could develop the markets and keep the world divided into territories, and duPont acceded to that system which the French wanted to develop.

The next document which I would like to have your Honor consider is Government's Exhibit 1007, appearing at page 1010 to 1014, and Mr. Gesell may have an objection to that document.

Mr. GESELL. This is the first of a group of documents, your Honor, some of which we have noted under the pretrial order
3544 formal written objection. We have also modified those objections in one particular under a stipulation which has not yet been filed with the Court, but which grew out of the pre-trial conference we had the other day. I think I should file the stipulation which, as far as it is here pertinent, involves an agreement on both sides as to the genuineness of the signatures appearing on these documents that originate from foreign sources.

The COURT. May I see it?

Mr. GESELL. Yes [handing paper to Court].

If I may go on for a moment, I think I can clarify the situation as to our position on the evidence.

The COURT. Under this stipulation, you mean?

Mr. GESELL. No.

The COURT. You mean in addition to the stipulation?

Mr. GESELL. Yes.

The COURT. Well, at that point I just wanted to make a suggestion, that when we come to read the record in this case, or when the higher Court comes to read the record in this case, I think it would be helpful if this stipulation were inserted in the record at this place, because this will help to explain the testimony or the documentary material which follows.

Mr. GESELL. I think that is very helpful.

The COURT. Would you hand this to the Reporter and tell him that this stipulation should be inserted into the record at this point.

3545 STIPULATION

1. Neither party shall object to any document produced from or available in the files of the defendant that shows on its face that it was sent from outside the continental limits of the United States, or that it is a translation or copy of such a document, on the ground that it has not been proved that the person or persons purporting to have signed such document actually did so. By this stipulation, neither party admits the truth, relevancy or materiality of any statement in an exhibit covered by this paragraph.

2. No other objections as to authenticity are waived. However, to facilitate discussion of the documents at the trial, the objecting party may consent to discussion of a document subject to later proof of authenticity. Where the objecting party desires proof of authenticity of a document prior to discussion of it, it will notify the other party as to which documents it will insist authenticity be established before discussion of them. Such notification may be made by proposed exhibit number, by category of document, or by other adequate identification of document. To the extent possible, such notice will be given by the objecting party reasonably in advance of the time that the proffering party has indicated that it will reach such exhibits in the presentation of its case.

3546 3. When a witness is called to authenticate a document, such witness shall at the same time authenticate all proffered exhibits of the party calling the witness that said witness is qualified to authenticate.

Mr. GESELL. Our objections, your Honor, are in two broad categories to some of these documents as have been noted. There are objections to materiality and relevance and there are hearsay

objections where we felt it proper to invoke the conspiracy question.

My suggestion to the Court would be that we proceed with the discussion of this first group of documents, letting them come into evidence subject to the objections which we have noted formally in the record, with the idea that after the entire group is in, in accordance with the suggestion your Honor made the other day, we can take up materiality, relevance and hearsay on these documents by a group. But letting them come in and be discussed, we of course are not waiving the objections that we have noted, and we can put those up at the end of this section of the case.

The COURT. All right, for the purposes of the record the Court recognizes the reservation made by Mr. Gesell and it should be noted on the record.

Mr. TUBRIDY. With regard to document 1007, appearing in Book 8, sir, at page 1010, the first page is a letter of trans-
3547 mittal from the Secretary in Henry Blum's office to Mr. Yerkes, the President of Du Pont Cellophane.

The COURT. Du Pont Rayon, it says here.

Mr. TUBRIDY. It says Du Pont Rayon there.

The COURT. How am I to know?

Mr. TUBRIDY. I explained that to you so you would be able to understand what followed, what it was in relation to.

The COURT. It is difficult as it is now, without having a letter addressed to the president of Du Pont Rayon and you call him the president of some other company.

Mr. TUBRIDY. And it transmits a letter which Blum received from Edmund Gillet, in relation to what is called the Sidac proposition.

The next letter is the letter from Mr. Yerkes to Mr. Pickard, who the letters recites is vice-president of E. I. duPont de Nemours and Company, dated November 12, 1929, stating:

"I am enclosing copy of the letter about which I talked to you on the telephone this morning. Inasmuch as you are going to Europe very shortly, it seems logical to suggest your discussing this matter with Mr. Gillet and Rene Bernheim.

"I understand that if you have an opportunity you will discuss this matter with Mudge and see if there is any legal way in which we could accomplish the control of this company, and I shall look forward to seeing you Thursday morning in New York."

3548 Now, this document relates to a proposition by Mr. Van Ham, who is President of the Board of Sidac, who approached the French people regarding the cellophane difficulties which they were having between Sidac and La Cellophane, and in this letter are comments made by Mr. Van Ham and suggestions

made by Mr. Gillet and requesting that this information be transmitted by Mr. Blum to the Du Pont Cellophane people.

Eventually out of this, your Honor, comes an agreement between Du Pont Cellophane and the French extending duPont's cellophane markets into South America and Japan and possibly China. This is the originating letter in that connection. I don't know how deeply your Honor wants me to go into this letter, since it is a preliminary letter and certain matters which were discussed therein actually are not material with regard to the eventual outcome of the arrangement which was arrived at, but I will pick out the pertinent parts which I think might be of some help.

The letter states:

"This gentleman came to see us recently, introduced to us by mutual friends, and declared to us, in a formal way, that this concern was very desirous of finding a basis of agreement with La Cellophane.

"We immediately answered him that we could not consider any conversation and any agreement so long as his company did not acknowledge that it had unlawfully taken possession of the patents, processes, know-how, technical and commercial data
3549 of the La Cellophane, and that it was ready to repair the moral and material damage it had caused to the La Cellophane and to its subsidiaries."

The COURT. Where is that?

Mr. TUBRIDY. The third paragraph, sir.

The COURT. I don't understand the morality of this thing. Is that a French phrase that has some significance?

Mr. TUBRIDY. I believe so. These are translations and some of these translations are a little bit different in translating the sense from the French into the English, and you have to translate the words in accordance with the possible differences in changes of language.

The COURT. Can you help, Mr. Gesell?

Mr. GESELL. I think so. The information was stolen from the French by the Belgians.

The COURT. I see.

Mr. MIXICUS. I don't think that characterization is proper. There has been no evidence of it at all.

The COURT. What is your understanding of the moral damage then?

Mr. MIXICUS. Why, I feel if they had no patents on this matter, your Honor, and the Belgians began to manufacture in Belgium, they had a perfect right to.

The COURT. Gentlemen, I don't want legal arguments. I look at a letter and it says, "* * * it was ready to repair
3550 the moral damage." I say, What does that mean?

Mr. MINICUS. My understanding, your Honor, is that it means this. As I said before, the French were then claiming the entire world and the French felt that some moral harm had been done to them by the mere fact of another corporation having the sheer nerve to start to develop and manufacture cellophane.

Mr. TUBRIDY. Your Honor——

The COURT. I am going to withdraw my inquiry.

Mr. TUBRIDY. I merely want to suggest again that this is a translation from the French.

The COURT. All right.

Mr. TUBRIDY. We are talking about moral and what the word originally was in French. We are just guessing. That is what it amounts to. It might mean morale, and they translated it to moral, that they damaged the morale of La Cellophane and its subsidiaries.

The COURT. I see. Go ahead, Mr. Tubridy.

Mr. TUBRIDY. Continuing:

"After this first declaration, Mr. Van Ham came back and told us that he was ready, in principle, to give us satisfaction and that he came back to ask us the exact conditions we would require for our agreement and the amount of reparations we demanded.

"We answered him that if the Sidac had acted correctly, it would have, as the E. I. duPont de Nemours & Com-
3551 pany or as Kalle & Co., asked us for a license for our processes, patents, and know-how, which license we would no doubt have granted to it on the same conditions as those agreed upon with our American and German licensees.

"After some discussion Mr. Van Ham declared himself ready to hand over to the French La Cellophane 35 per cent of the founders shares.

"He also declared to us that he was ready to enter into a complete technical and commercial agreement. The details are to be agreed upon. It will be based on an apportionment of production, a division of the territories and on almost equal sales prices."

So we have Sidac coming in sideways into this entente.

Continuing:

"It seems therefore that the European question is likely to be solved on the basis I am indicating to you and we almost have the conviction that the agreement can certainly be obtained.

"We naturally told Mr. Van Ham that we could not consider any agreement for Europe if the American and German situations were not settled."

Here is La Cellophane as the intermediary as it was all the way through for duPont.

Continuing:

"We explained to Mr. Van Ham that the E. I. duPont
3552 de Nemours & Co. had been put in possession by the La Cellophane of all its manufacturing rights for the entire continent of North America and that the putting up of a plant by Sidac in the United States was going to cause the E. I. duPont de Nemours & Company or its subsidiaries considerable damage which added to that, which Sidac had caused to it by importing, for some years, considerable quantities of its products, which importations had caused a continual lowering of cellophane sales prices in the United States.".

And Sidac at this time did not have any moistureproof patents. They were selling on the basis of these patents and selling them into the United States, an article which had no patent protection in the United States, plain cellophane.

"Mr. Van Ham was willing to admit, in principle, that the American company of Sidac, and another company of which he is also the President, indemnify the Du Pont Cellophane Company for the damage which is caused to it, by handing over a part of the founders share.

"He also agreed, in principle, to an agreement between the Du Pont Cellophane Company and his company as well for the limitation of production by his American company as for the conditions of sales of cellophane in the United States.

"He told us, incidentally, that his company had severed relations with Birn & Wachenheim with whom, he advised us,
3553 they have had nothing but trouble. He added that Birn & Wachenheim were separating and that it was probably that they would not continue to interest themselves in the cellophane product and that they had ceded all their installation and their implements for the use of cellophane in the United States to a newly formed American company."

3554 "Mr. Van Ham informed us that Mr. Wallack"—Mr. Wallack is the president of Sylvania Corporation, sir—"Mr. Van Ham informed us that Mr. Wallack was a great friend of Mr. Pickard. Mr. Wallack has kept him informed, recently, of the conversations he is supposed to have had with Mr. Pickard regarding the Cellophane. He asked us if he could write to Mr. Wallack to inform him of the intentions of the Board of the Belgian SIDAC and to ask Mr. Wallack to enter into conversations with the Du Pont Cellophane Company to study the bases for an agreement.

"We told Mr. Van Ham that we saw no objection to his writing next week to Mr. Wallack and to the latter approaching the Du Pont Cellophane Company, but we are asking you to advise our

friends beforehand and to ask them to study the conditions under which this Entente is possible, taking into consideration American laws.

"The American company was formed with a capital of 400,000 shares of common stock the value of which is $17.00.

"Two-thirds of these shares belong to the Belgian group and one-third to the American group.

"The ⅔ belonging to the Belgian group are made up, part in founders shares and part in shares subscribed for in money.

"We deem that the Du Pont Cellophane Company should demand from the Belgian companies to cede to it all or a part
3555 of the founders shares.

"We call to your attention the fact that we are demanding from SIDAC 35% of all its capital.

"In case the American laws would make such an official entente between the Du Pont Cellophane Company and the American Company of Sidac impossible, we can offer to the Du Pont Cellophane Company the intermediary of one of our European companies which would receive for the account of the Du Pont Rayon Company the shares that would come to it and which would act as an intermediary for the fixing of the proportion which would be attributed to this new company in the American production.

"From the data we have, this new plant is to put in operation 2 machines. Do our friends deem that 10% of the machines producing in America would be agreeable? This would make this new plant could not have the right to increase the number of its machines as long as the Du Pont Cellophane Company did not have 20 machines in operation.

"For Europe and even for the whole world, we have mentioned a figure of 10%. Mr. Van Ham seemed to us ready to accept all our conditions. In fact he has made no objection except on the question of the proportion of production.

"As our friends no doubt know it"——

The COURT. Who are these friends that he is talking about?

3556 Mr. TUBRIDY. I believe it is duPont.

"As our friends no doubt know it, Sidac has under consideration an enterprise for the manufacture of a film having a cellophane base."

I think we can skip that paragraph, sir, because it is not particularly pertinent with regard to this matter.

"In short, we leave it to you to explain all this situation to Mr. Yerkes and to Mr. Pickard and to see with them what propositions can be made to Mr. Wallack for an agreement which he must be desiring very much as we have very well felt that this group is

very much afraid of the consequences that the excessive competition in cellophane has had on the sale prices.

"Mr. Van Ham told us that Mr. Wallack had entered in the United States into relations with an enterprise of German origin which also wants the processes for the putting up of a plant in Germany.

"It is understood that all negotiations for an enterprise of this character must be immediately put aside.

"We confirm to you at the same time the cable we have just sent you in order to keep Mr. Pickard advised:

"'NEGOTIATIONS SIDAC COLLOPHANE BEING ON THE RIGHT WAY PLEASE HAVE PICKARD AWAIT DETAILS BEFORE SPEAKING TO WALLACK.'

"Sincerely yours,

"EDMOND GILLET.

3557 "P. S. We are disposed to accept reciprocity for technical cooperation for Europe. Would our friends consider the same thing for your country?"

Now, in connection with that I will call your Honor's attention to the second page of that exhibit, which I state again says, "I am enclosing a copy of the letter about which I talked to you on the telephone this morning. Inasmuch as you are going to Europe very shortly, it seems logical to suggest your discussing this matter with Mr. Gillet and Rene Bernheim."

So we can't say that everything is completely documented with regard to what actually happened. Some of this was oral conversations that were carried on.

The next document which I would like to call to your Honor's attention, which I offer in evidence, is Exhibit 1010, appearing at page 1019 to 1022.

Mr. GESELL. Are you going to skip all the documents between them?

Mr. TUBRIDY. Immediately, yes.

(The memorandum headed Sylvania Industrial Corporation, dated January 14, 1930, was received in evidence and marked "Government's Exhibit No. 1010.")

Government's Exhibit 1010

Mr. TUBRIDY. This Exhibit 1010 is a letter from Mr. Yerkes to Mr. Carpenter, in which he states he is enclosing a memorandum

"which I think covers our talk of yesterday. I have given

3558 Albert Blum a copy of this and he wants to mail it as it is to Mr. Gillet. I told him that this was my interpretation of your thoughts and that before doing that I wanted your

permission. Personally, I see no objection to sending Mr. Gillet a copy of the memorandum just as it is."

Memorandum states:

"Mr. Gillet telephoned Mr. Albert Blum advising him that the deal between the French Cellophane Company and the Belgian Sidac was progressing very rapidly and barring some unforeseen chance would probably be consummated.

"This deal involves the receipt by La Cellophane of a large proportion of common stock, estimated at 35%, in the Belgian Company. This stock is to be acquired without money consideration, it being an acknowledgment on the part of the Belgian Company of the practical pirating of the process from the French.

"Mr. Gillet inquired of Mr. Blum what cash compensation the Du Pont Cellophane Company would consider in payment for the rights lost by the Du Pont Cellophane Company by reason of the Belgian Company having set Wallach up in business here.

"Mr. Carpenter's slant on this situation is that in order to protect the Du Pont Cellophane Company in their technical arrangements with the French (that is, in order to stop information going from us to the French, to the Belgians and back to Wallach) it would probably be advisable to set up some scheme which
3559 would separate the Belgian Company completely from the American company. He also felt that inasmuch as Wallach had committed no offense there was no reason for him to participate in any payment to us. The Belgian Sidac were the offenders and whatever compensation is paid should be paid by them, and also if possible they should be deprived of any benefits proceeding to them from the American Company.

"Mr. Carpenter also feels that Wallach being established here and a competitor, it might be good policy for us to play along with him, so to speak, not in a technical way but in a friendly way, provided the benefits of this went to Wallach and his American company and not back to the Belgian Sidac and eventually back in part to the French.

"Following this reasoning, Mr. Carpenter suggested that the Belgian Sidac give to us their entire stock interest in Wallach's American company. We in turn would destroy half of these shares and sell the other half to Wallach at a price somewhat under $17.50 per share, which was the price paid by Wallach and the American stockholders under their original subscriptions." Giving back to a competing company one-half the shares which they are going to obtain, which was a proposition of these duPont officials.

Mr. GESELL. You don't contend that was done, do you?

Mr. TUBRIDY. I won't contend that was done. I merely want to show a state of mind.

"At the same time that this was done, Wallach and
3560 the Belgian Sidac would break completely all technical relations, exchange of patents, etc.

"Assuming the Belgians have 160,000 shares (40% of 400,000) of the American company, valued at $17.50 per share, and that we sold Wallach half of this amount or 80,000 shares at say $15.00 per share, this would necessitate a payment by Wallach to us of $1,200,000. Wallach could of course offer this to his American stockholders on an attractive basis but above cost to him, and would put himself in a much stronger position by this increased cash and also by reason of the fact that his capital shares would be reduced by the 80,000 destroyed or cancelled by us, and his outstanding stock would then be 320,000 instead of 400,000, increasing by so much the equity of the already stockholders.

"This suggestion would accomplish the following:

"First, it would not set Wallach up in a stronger position and on a friendly relation with us, and in a much stronger financial position.

"Second, it would break the technical and patent relations between Wallach and the Belgian Sidac.

"Third, it would prevent the Belgian Sidac from participating in any way in the profits of the American Company, to which they are not fundamentally entitled.

"Fourth, it would prevent the French from participating
3561 in any way in the profits of the American company (Sylvania), to which they are not entitled.

"Mr. Carpenter also called attention to the fact that it would probably be impossible for the Belgian Sidac to pay us adequate compensation, assuming that the present status quo of the stockholders should remain the same.

"Wallach put $3,500,000 in the American company, representing 50% of the common stock; therefore the value of the American company is $7,000,000. The Belgian Sidac we understand now own 40% of the common stock, or a valuation of $2,800,000. Therefore if they want to give us compensation in cash for participation in the American market, we should be paid $2,800,000.

"If we figure it another way, it becomes even worse. Assume that Wallach's company will obtain 20% of the American business, or 2,000,000 pounds per annum, a profit of 25¢ per pound is $500,000 per annum. Capitalizing this on a 5% basis the loss which we sustain by Wallach's entering this field becomes $10,000,000.

"The writer's slant on this whole subject is quite different. If we agree to any proposal involving compensation it means in effect

that we acquiesce to the French participation, through the Sidac Company, in the American Cellophane business, and this means that we agree to the French breaking the terms of their contract with the Du Pont Cellophane Company because it is clear
3562 that the French will benefit very largely by their participation in Sidac and the profits of the Sylvania Company. If we agree to this, obviously we are left free to break other provisions of the contract ourselves.

"I would therefore suggest that we allow the French to participate in the Sidac Company and that we allow or agree that the Sidac maintain their participation in the American company and in return for this ask the French to relieve us of the provision of the contract under which we are obligated to sell only in North and Central America. In other words, throw the world Cellophane market open, outside of France, Belgium and Germany where licenses have already been granted, and if the French were willing to agree to this I would suggest no cash or other compensation of any kind.

"I think we should also insist that the technical arrangement and patent arrangements which we have with the French be definitely confined, as they are now, to them and to Kalle, so that under no circumstances should technical or patent information flow from us through the French or through Kalle to the Belgians and back again to Wallach. As a practical matter this would be difficult, but perhaps in the main this could be accomplished.

"I would prefer to forego cash compensation and the separation of Wallach's American Company technically and otherwise from the Belgians, in return for permission to sell Cellophane in open competition in the markets of the world.

3563 "As to the probability of the French or Belgians accepting either of these two ideas, I believe there would be more possibility of their agreeing to my suggestion than to Mr. Carpenter's. I do not believe the Belgian Sidac would be willing to give up for nothing their entire participating in the American Sylvania Company, nor perhaps would the French, although the French are not entitled to any participation in this country, and unless it was given up entirely the object, insofar as the technical relations are concerned, would not be accomplished. There is even some doubt in my mind that if they did sever their stock ownership in the American company completely, there might still be, through the French, etc., swapping of technical information which would never be known to us, or there might even be some secret arrangement made by Wallach and Sidac companies for participation in the profits, etc. etc., unbeknownst to us.

"As a practical solution I believe it is simpler to let the edifice stand in its present condition—the relationship; stockholdings, etc. etc., let the French acquire what interest they can in the Belgian company, and allow us to sell in the world markets."

3564 The next exhibit which I offer in evidence will be 1011, appearing at page 1023.

(Letter from Marian C. Lepper, Secretary, Du Pont Rayon Company, to Mr. J. K. Jenney, dated January 31, 1930, was received in evidence and marked "Government's Exhibit No. 1011.")

Mr. TUBRIDY. That appears in Book 8 and is a letter from the Secret ry to Mr. Jenney in which she states——

Mr. GESELL. Are you going to skip the others that come before that, too, 14, 13 and 15?

Mr. TUBRIDY. This is 1011.

Mr. GESELL. 14, 13 and 15 come before it in sequence. Are you going to skip them?

Mr. TUBRIDY. Yes. We are going to skip them. That letter reads:

Enclosed you will find copy of a cable received from Mr. Pickard in reference to the Sidac negotiations. The memorandum referred to was written by Mr. Yerkes on January 14th and sent to Mr. Pickard. We haven't an extra copy in the office just now, but will send you one a little later . . ." et cetera, et cetera.

The telegram to Yerkes reads:

"REFERRING TO YOUR MEMORANDUM REGARDING POSSIBLE ARRANGEMENT WITH SIDAC, GILLET AND BERNHEIM HAVE NOT CONCLUDED ARRANGEMENTS AND PROPOSED COMPENSATION HAS SHRUNK

3565 VERY MUCH (stop) WITHHOLD PLAN SUGGESTED * * *"

Mr. GESELL. No, it is "neither plan."

Mr. TUBRIDY. Excuse me, "NEITHER PLAN SUGGESTED BY YOUR MEMORANDUM IS ACCEPTABLE (stop) I HAVE PROPOSED WORLD WIDE SELLING COMPANY IN WHICH WE WOULD SHARE WHICH WOULD HANDLE THIS BUSINESS, EXCEPT IN THE TERRITORIES COVERED BY——" the next word——

The COURT. I believe it is "existing."

Mr. TUBRIDY. I have a very poor copy. "* * * BY EXISTING AGREEMENTS IN FRANCE, GERMANY AND UNITED STATES (stop) THIS COMPANY WOULD BE SIMILAR IN CONSTITUTION AND ACTION TO OUR SOUTH AMERICAN EXPLOSIVES COMPANY (stop) SUGGESTION WELL RECEIVED AND GILLET WILL INVESTIGATE ITS POSSIBILITIES (stop) ADVAN-

TAGES TO US ALL OBVIOUS (stop) FURTHER DETAILS BY LETTER."

Mr. GESELL. It says, "Advantages to us are obvious," not "all."

Mr. TUBRIDY "Advantages to us are obvious (stop)."

Now, the next document which I would like to offer in evidence is 1012, appearing at pages 1025 and 1026 of Book 8.

Mr. GESELL. Again you are skipping 16 and 14 in between?

Mr. TUBRIDY. I am putting in 1012.

Mr. GESELL. I feel I should point out as we go along that this is a very piecemeal presentation of these facts.

3566 (Memorandum from Mr. B. M. May dated February 14, 1930, with no addressee, was received in evidence and marked "Government's Exhibit No. 1012.")

Mr. TUBRIDY. This is from Mr. May, Vice-President, and apparently it is a memorandum written by him under date of February 14, 1930. It has no addressee on it. It reads:

"From the correspondence and other developments which have arisen since this Sidac matter arose last summer, it would appear Sidac may be in a stronger position in respect to an attack on patent grounds than we first suspected and that they are attempting a move to protect themselves from a price war, the results of which will be costly to all concerned.

"Are our interests in general likely to be benefited in the long run by having Sidac, and probably Wolff, within the circle of our joint influence or is it better from our standpoint to hold aloof, have Sidac exploit territory from which we are now excluded and also run the danger of having Wolff sell his rights in America?

"Aside from any damages or other penalties which might result from a favorable patent suit against Sidac per se, do we feel that such an issue could possibly improve our competitive position with Sylvania in this country? Our patent attorneys tell us the manufacture of 'Cellophane' is an open art here from which it would appear we have no action in law against them.

3567 "It appears possible that Sidac's activities have not only resulted in damage to us through their sales in this country, but have also interfered with Kalle & Company's territory through sales made therein."

They are not supposed to sell any place.

"La Cellophane has likewise been damaged."——

The COURT. Was that an editorial comment on your part? Did you break in there?

Mr. TUBRIDY. I broke in, that they are not supposed to sell any place.

The COURT. I don't think you ought to make those comments. Strike that.

Mr. TUBRIDY. Continuing:

"Have we, therefore, a situation where this crowd has run amuck, has damaged all of the rightful owners of the business, * * * that is underlined: I would like to accentuate that——

Mr. GESELL. It isn't on this document.

Mr. TUBRIDY. "* * * has damaged all of the rightful owners of the business * * *" I said I would like to accentuate that to your Honor.

The COURT. Do you want me to underline it?

Mr. TUBRIDY. Yes, please.

"* * * leaving the latter in an indefensible position so far as the law is concerned, and leaving but two choices—to fight
3568 it out along the present lines or come to some accord that will stabilize the business in a world sense? Sidac is apparently desirous of doing this and willing to pay something to accomplish it.

"Shall we take a 'dog in the manger' position, tell the French we will not consent to their taking stock in Sidac, because of Sidac's interest in Sylvania, thus putting it up to them the choice of violating their contract with us or foregoing reparations from Sidac?

"Suppose they chose to do the former. We could then in turn to into these markets, not sold to Kalle & Company, and compete therein with Sidac and La Cellophane. Such a course may in the long run lead to disagreeable results, too obvious to mention here.

"Suppose they take the remaining alternative. La Cellophane foregoes reparations, resulting in a loss to them, and with what gain to us?

"Sylvania is here and probably to stay. We cannot stop them so why pass up an opportunity to enlarge our territory even should we have to share that enlarged territory with others? Any business we may get outside of the territory we have purchased would help to compensate us—concededly in a small way—for the dilution of our territory by Sylvania.

"Even though it might be agreed to give us exclusive rights in South America, how well could we guard them effectively
3569 against leakage? It took us a long time to stop leakage into the United States in the early days when La Cellophane was the only European manufacturer."

* * * * *

3578 *Government's Exhibit 1017*

Mr. TUBRIDY. Exhibit 1017 is a letter from Mr. May to Mr. Bernheim dated June 2, 1930:

"I acknowledge receipt of your letter of May 23rd with which was enclosed duly executed on the part of La Cellophane two copies

of the agreement covering the new arrangements in respect to Cellophane territory."

Exhibit 1018 is a letter from May to Mr. Charles Copeland, reciting how this agreement was brought about and requesting that the document which has been duly executed by the proper parties should be attached to the original agreement now in your possession so that the record will be clear that our territory has been extended to the countries named.

I would like to offer in evidence document 1021, appearing at page 1039 of book 8.

(A letter of January 7, 1931 on the letterhead of Du Pont Cellophane Company to Mr. J. E. Hatt was received in evidence and marked "Government's Exhibit No. 1021.")

Mr. GESELL. May I inquire whether we are going to come
3579 back and discuss the ones that are being skipped, just so I can make my own plans for comments, your Honor?

The COURT. Could you answer that inquiry, Mr. Tubridy?

Mr. TUBRIDY. Not at this time. Not at this particular session, your Honor. I would like to arrange my documents in my order of proof.

The COURT. Mr. Tubridy selects his own weapons for this case and the manner of utilizing them; so it seems to me that he is not going to comment on those exhibits at this time. In fact, he is not even offering them into evidence; so I don't see what there is for the defense to make comment on. Certainly, I have enough papers before me to make comment on without making comment on something that is not in evidence.

Mr. GESELL. I agree with that, but if he is coming back to them——

The COURT. Well, if he does, I feel certain you will comment on them. Recess for 10 minutes.

(Recess was here taken.)

Mr. TUBRIDY. Exhibit 1021 is a letter from Mr. Yerkes to Mr. Hatt, and indicates how these arrangements which have been entered into are working out and the information which they transmit back and forth to each other and the close collaboration that exists between the two.

Exhibit 1021 states, with regard to Japan:

3580 "During the year 1929, the French sold 20,000 kilos, Sidac 17,000 kilos, Wolff 17,000 kilos, in this country; Kalle being excluded, sold none.

"The French have no objection to our setting up our own agent in Japan and selling whatever quantities we are able to sell, allowing the allocation and distribution of the sales in accordance with the French-Sidac agreement to be worked out at some later date.

"They do not recommend their own agent: in fact they say frankly he is no good.

"You are therefore at liberty to set up any sales arrangement you see fit in Japan for both regular and moisture-proof Cellophane.

"They are also willing and rather anxious to have us study the entire Japanese situation from the viewpoint of future sales of Cellophane, with the possible idea of putting up a plant there. They have no one available for this job themselves, but if we decide to send some one from here to study the entire situation, I am sure they would be only too glad to divide the cost with us. If, on the other hand, we go on for the time being studying the situation through some agent or some one already there, I do not think it advisable to attempt to charge them with any of this expense.

"SOUTH AMERICA: The French are willing to allow us to go into South America on the same basis as Japan; that is, to sell as much regular and moistureproof as we can in 3581 any of the South American countries. The allocation of the poundage will be made at some later date if and when the French-Sidac agreement is finally made.

"BRAZIL: In Brazil in 1929 the French sold 31,000 kilos, Wolff 8,000 kilos, Sidac 2600 kilos.

"The French have a very good agent here, whose name is Flogny. They recommend him highly and suggest that we use him for this territory.

"ARGENTINE: In this country in 1929, the French sold 17,000 kilos, Wolff 12,000, Sidac none.

"The French have an agent in Argentina, but they feel that he is not reliable and suggest that we handle this country in any way that we see fit, without regard to their agent."

I think that document shows, your Honor, that with regard to licensing back and forth between two companies that this information which is transmitted back and forth between these companies far exceeds anything provided for in any agreement between them, and that there is an outside understanding that exists between all these corporations which you won't find in any written documents.

I would like to offer in evidence Exhibit 1022, appearing at page 1042 to 1044 of book 8.

Government's Exhibit 1022

(The letter of February 15, 1935, from B. M. May to Mr. W. S. Carpenter, vice-president, E. I. duPont de Nemours &

3582 Company, with attached letters, was received in evidence and marked "Government's Exhibit No. 1022.")

Mr. TUBRIDY. The top covering letter is a letter from Mr. May to Mr. Carpenter, stating: "As per your request when you were in the office today, we are enclosing copies of the following letters:" and he cites three letters in there. The first letter is a letter of April 1, 1932, La Cellophane to J. E. Hatt. Also photostat of map which accompanied this letter.

I am only going to discuss the first letter, a copy of which is attached. This sets out this cartel which existed between these various cellophane companies. It is from F. Meyer, Commercial Director of Societe "La Cellophane" to Mr. J. E. Hatt, General Manager, DuPont Cellophane Company, Inc., dated April 1, 1932:

"WOLFF PRICES IN CUBA:

"We have received in due time your favor of the 18th February, and beg to apologize for having kept you waiting with our reply thereto.

"Messrs. Wolff & Co. do belong to our Convention and they are bound to respect our prices. By the way we told you in our letter of the 10th December that this firm was a member of the Syndicate, and they they were selling at identical prices as ours. We further stated the share this firm has had in the South American and Japanese business so far.

3583 "We, therefore, do not understand why you ask us which is the position of this German Factory with regard to our Convention with S. I. D. A. C.

"In order to give you an idea of how this Convention works we are sending you under separate cover a colored map of the globe indicating the countries in which every member has an exclusivity or may sell in conjunction with other members.

"We distinguish between:

"1. Reserved countries——

"2. Open markets with price agreement——

"3. Open markets without price agreement.

"RESERVED COUNTRIES—CELLOPHANE BEZONS: France and French colonies (red color on the map).

"S. I. D. A. C.: Belgium–Luxemburg–Holland–Italy and resp. colonies (green color on map).

"KALLE & WOLFF & Co.: Germany. (Blue color on the map.)

"There is no price agreement whatsoever concerning the reserved countries, every member being at liberty to fix his own selling prices, Germany excepted where Wolff & Kalle fix the tariffs in common."

The COURT. Before you go on, Mr. Tubridy——

Mr. TUBRIDY. Yes, sir.

The COURT. Is there any writing which memorializes
3584 or describes what the author of this letter means when he uses the words "Convention" and "Syndicate"?

Mr. TUBRIDY. Not that I know of, sir.

The COURT. From the evidence which you have reviewed, what is your understanding?

Mr. TUBRIDY. My understanding is a Convention and Syndicate is another word for cartel or arrangement or entente, an agreement between all the manufacturers to divide world markets, agree not to compete, this is your territory and this is our territory, the foreign system whereby each man has an allotment to himself and he has a monopoly in it and can develop that area.

The COURT. Proceed.

You were down to "open markets."

Mr. TUBRIDY. Yes, sir. "OPEN MARKETS WITH PRICE AGREEMENT: We distinguish 2 sectors:

"1. EAST (light blue) belonging to Kalle, Wolff and S. I. D. A. C.

"2. WEST (pink) belonging to BEZONS, WOLFF and S. I. D. A. C. i. e. the selling arrangement that we have with KALLE has been taken over into the Convention."

The COURT. Just a minute, Mr. Tubridy. In the course of your journies through the labyrinthian files of the defendant did you ever happen to find this map?

3585 Mr. TUBRIDY. No, sir, but I call your attention to the fact that on the top it says, "We will send promptly photostat of map showing duPont territory."

Mr. GESELL. Would your Honor like a copy?

The COURT. I would like to see it.

Mr. TUBRIDY. I would like to call your Honor's attention to that letter and that note on the top letter which says, "will send promptly photostat of map showing duPont territory." We would have been able to reproduce it later on from the information which comes out later. It is very kind of Mr. Gesell to give it to us now.

OPEN MARKETS WITHOUT PRICE AGREEMENT: These we might call DU PONT Sector. Owing to the fact that you preperred not to join the Convention we could not keep WOLFF and S. I. D. A. C. away from your markets, i. e. the United States, Canada, etc. as they would not get anything in return, whereas ourselves would, of course, as in the past, refrain from selling in your territory."

I would like to comment in conection with this. You have these observations in which they describe allocation of world territories. Then they talk about part of the territories being duPont's territory; then they say, "owing to the fact that you preferred not to join the Convention"—now, they do not——

Mr. GESELL. "We could not keep Wolff and Badac away from your markets." Why don't you read the whole sentence?

3586 Mr. TUBRIDY. The sentence is there to be read. I would like to emphasize the sentence that I would like to emphasize in connection with it. Mr. Gesell has his opportunity later.

I would like to call your Honor's attention to the inconsistency of the situation where duPont is allotted territory and other people are going to stay out of duPont's markets, but they are not supposed to be part of this Convention.

The COURT. But don't argue your case now. Just read me the document.

Mr. TUBRIDY. I would not have gotten into it except Mr. Gesell got me off.

The COURT. I understand.

Mr. GESELL. Can't you read the whole sentence, Mr. Tubridy? You will have no difficulty.

The COURT. What sentence is it?

Mr. TUBRIDY. It is with regard to "open markets without price agreement."

Mr. GESELL. The second sentence, your Honor, under that heading.

Mr. TUBRIDY. It starts off. "These we might call DU PONT Sector."

The COURT. All right.

Mr. TUBRIDY. "CUBA: being situated north of the Panama Canal, belonging thus to your territory, WOLFF & Co.

3587 are quite free to fix their selling prices and enter into open competition with yourselves. We have no means to hinder them from doing so, and it is up to you to get in direct touch with this firm, if you care to come to a price agreement in the countries that are not subject to our Convention rules.

"As requested we return you herewith the photostatic invoice which you were good enough to send us, and we trust that above explanations concerning our Convention will put matters clear now."

My own comments: duPont receiving information as to what is going on in this Convention, which they are not supposed to be members of.

Mr. GESELL. Is it contended that we joined at this time, your Honor, because we didn't know about it until now.

The COURT. Do I have something before me to rule on?

Mr. TUBRIDY. Not that I know of, your Honor.

The COURT. Proceed.

Mr. TUBRIDY. "We may add that every factory has got a share of a fixed percentage of the business done with the open markets

(light blue and pink), whereas the quantities sold in the reserved countries do not account for the final share of each member. One might be inclined to think that this would favor hidden exportations out of the reserved countries into the open market in order to increase ones own shares, but as a matter of fact we have
3588 only in very rare occasions met with such shipments which by the way we feel sure had been made against the will of the Manufacturers in question.

"We shall be pleased to receive by return mail your selling figures in South America and eventually in Japan, for which we have previously requested you, as we are anxious to get straight as soon as possible with our partners."

* * * * * *

3596 (Letter from C. M. Spargo to Dr. E. B. Benger, dated January 12, 1934, was received in evidence and marked "Government's Exhibit No. 1027.")

3597 The COURT. Now what paragraph do you want me to look at?

Mr. TUBRIDY. The next to the last paragraph, which merely indicates the operation of the agreement between La Cellophane and Du Pont, the transmission of information between them.

The COURT. I am looking now at Government's Exhibit 1027, and what paragraph do you want me to note?

Mr. TUBRIDY. Just the third from the last, beginning "From the language of the agreements above referred to * * *."

The COURT. Fine.

Mr. GESELL. I am afraid I didn't hear Mr. Tubridy. What is the point about it?

Mr. TUBRIDY. It is the transmission of information and the limitations on information which can be transmitted back and forth as a result of the agreements that have been entered into.

The COURT. Who do you identify I. C. I. as?

Mr. TUBRIDY. Imperial Chemical Industries.

Mr. GESELL. Doesn't it say, the information may be freely given to I. C. I.?

Mr. TUBRIDY. I point out that the freely given or not given depends upon the interpretation of the agreement between Du Pont and Cellophane.

The COURT. Now wait a minute. I am a little confused.

3598 Mr. TUBRIDY. Then I will withdraw the exhibit if it is causing that much confusion.

The COURT. Go ahead. I don't have to read it.

Mr. TUBRIDY. All right. Government's Exhibit 1027 is withdrawn.

(Government's Exhibit No. 1027 was withdrawn at this point.)

Mr. TUBRIDY. The next exhibit I would like to offer in evidence is Exhibit 1028, appearing at page 1052 of Book 8.

(Letter from Mr. Pralatowski to Mr. Pritchard dated January 31, 1933, was received in evidence and marked "Government's Exhibit No. 1028.")

Mr. TUBRIDY. This is a letter from Mr. Pralatowski, who is Director of Patents of Du Pont Cellophane, addressed to Mr. Pritchard of duPont, dated January 31, 1933.

Mr. GESELL. Mr. Pritchard is not with duPont. He was an outside counsel for duPont and I advised the Government of that yesterday.

Mr. TUBRIDY. I will accept that, your Honor. The point is, it was Mr. Pralatowski who wrote the letter.

The COURT. Who were the two gentlemen of duPont who met on February 11, 1930, in Paris?

Mr. TUBRIDY. Mr. Pickard and Mr. Swint.

The COURT. It was Pickard, not Pritchard, the person mentioned here?

Mr. TUBRIDY. That is right.

3599 I would like to call your attention to the second paragraph of this Exhibit 1028—or I might read the first paragraph first, to make the second paragraph more pertinent.

The COURT. My copy doesn't show what year this is.

Mr. TUBRIDY. 1933—January 31, 1933. It is regarding a British patent. It says:

"Replying to your letter of January 26, I have read the proposed license and I would like to call your attention to the following comments, none of which are particularly significant and all of which you can well evaluate as to their worth.

"In the last paragraph starting on page 1 appears 'WHEREAS, LA CELLOPHANE, in said contract, reserved to itself the territory including the United Kingdom of Great Britain'. I recollect that about a year ago when we were negotiating an agreement with La Cellophane and Kalle on Caps and Bands, we were required by the Wilmington Legal Department to delete from the proposed agreements statements relating to the division of the world territory to the respective associates. I raise, therefore, for your consideration the question as to whether this passage is proper in view of the Clayton Act, realizing, of course, that the owner of a patent may license for some territorial fraction and not for another, but basing my comment on the fact that this passage is not clearly referring to license arrangements but rather to a broa agreement."

3600 I would like to offer in evidence Governments Exhibit No. 1029, appearing at page 1054 in Book 8.

(Letter from Mr. Hess to Mr. Pralatowski, dated February 1, 1933, was received in evidence and marked "Government's Exhibit No. 1029.")

The COURT. May I make an inquiry with respect to 1028?

Mr. TUBRIDY. Yes, sir.

The COURT. It is one thing for the defendant's legal department to tell them to delete from the proposed agreements statements relating to the division of the world territory to the respective associates, and it is another as to whether they actually in fact broke up such an arrangement. Do you see the distinction I am making?

Mr. TUBRIDY. Yes.

The COURT. Do they follow the advice of the Legal Department or simply strike them out of the agreement?

Mr. TUBRIDY. The basis for which we offer this to your Honor was that the Wilmington Legal Department were being concerned at that time with the licensing back and forth. They weren't basing on licensing; they were afraid it was going to come to the attention that this was based upon a broad territorial allocation of territory, not upon a licensing agreement. So they are telling them not to base it upon a division of territory agreement, but to base it on the licensing.

The COURT. But the acts done were all the same, were 3601 they not, no matter what you call it?

Mr. TUBRIDY. I agree, sir, the acts were all the same.

Mr. GESELL. May I interject a piece of information, your Honor.

The COURT. Yes.

Mr. GESELL. Mr. Pralatowski is not a lawyer and is not a member of the duPont Legal Division.

The COURT. Proceed.

Mr. TUBRIDY. May I call your attention——

The COURT. Proceed. I have finished.

You are offering 1029?

Mr. TUBRIDY. Yes, sir. This is in reply to Mr. Pralatowski's letter in which he points out that there had been a policy which had been going on in duPont with regard to licensing under the cellophane agreements. He says in paragraph 2, "Apparently, Mr. Pritchard has considered that a different form of license is required for these British patents, as the licenses to La Cellophane for other European countries do not contain the features you now call attention to."

I would like to offer in evidence Government's Exhibit 1032, which appears at page 1059, of Book 8.

(Letter from Du Pont Cellophane Company, Inc. to B. M. May, dated November 28, 1934, was received in evidence and marked "Government's Exhibit No. 1032.")

Mr. TUBRIDY. This, your Honor, is primarily a letter
3602 directed to the exact definition and limitation of Du Pont's territory, the question of determining whether is was entitled to the islands adjoining the North American continent and including the question of whether if included the Philippine Islands. This letter reviews the past agreements in connection with the two, and Du Pont was desirious of taking the position with the French that they are entitled to the islands off the North American continent.

It is just a sharper delineation of the territories which were allotted to Du Pont, and the question is just as to these islands off the coast of America.

The COURT. Give me just a moment to look at it, please.

Mr. TUBRIDY. Yes, sir.

The COURT. Now, the communication is addressed to Mr. May—who sent it?

Mr. TUBRIDY. It is from an official, F. G. H. I don't know who F. G. H. is.

Mr. GESELL. Mr. Hess, the same man who wrote the earlier one.

Mr. TUBRIDY. He requested of Mr. May that the information be supplied.

The COURT. I think we will take our luncheon recess at this point. We will recess until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m. of this same day.)

3603 2:15 O'CLOCK P. M. THE SAME DAY.

Present: As before noted.

Mr. TUBRIDY. I would like to offer into evidence Government Exhibit No. 1033, appearing at page 1061 to 1063, in book No. 8. This document is a further discussion or deals with the limitation of duPont's territory and arises out of the territory which is to be allotted to the British Cellophane Company, and the British Cellophone Company's position will be discussed later.

(The report dated December 3, 1934, from L. A. Yerkes to Executive Committee, E. I. duPont de Nemours & Company was received in evidence and marked "Government's Exhibit No. 1033.")

Mr. TUBRIDY (reading): "In October of this year Mr. Hanbury-Williams, a Director of Courtaulds, submitted to and discussed with us a proposed technical agreement to be entered into between the new British Cellophane Co. and Du Pont Cellophane Co., provisions for such agreements being contained in the agreement between duPont and the French to undertake the manufacture of 'Cellophane' in our part of the world.

"After reviewing the proposed agreement with the Legal Department and making various alterations therein, we

3604 came to an accord with Mr. Hanbury-Williams on the essential points except on the description of our respective territories. The proposed draft as submitted by the British read:

"'For the purpose of this agreement the territory of Du Pont and of the British Company shall be deemed to be as follows: viz: As to Du Pont North and Central America and as to the British Company the British Empire (which expression includes India, British Dominions and Colonies, but does not include Egypt or any mandated territories) excluding the Dominion of Canada.'

"We told Mr. Hanbury-Williams we could not consent to that description and inserted the following in substitution:

"'For the purpose of this agreement the territory of Du Pont and of the British Company shall be deemed to be as follows:—As to Du Pont North and Central America including any British territory which is a part thereof and including the West Indies. As to the British Company the British Empire (which expression includes India, British Dominions and Colonies but does not include Egypt, any mandated territories or that portion of the British Empire reserved to Du Pont as defined above).'

3605 "In taking our position it was found upon our belief that DuPont had acquired 'North America' in the all-inclusive sense of that description, not only the continental part thereof, but the islands in the Caribbean, the Bahamas and Newfoundland, and all the Central American countries.

"Mr. Hanbury-Williams has reported our differences to Mr. Bernheim, who has written us under date of November 15th, 1934:

"'We have heard that in a conversation Mr. Hanbury-Williams had in your office a declaration was made to him that the isles which were of a certain distance from Europe and nearer America were belonging to your sector.

"'This has never been our understanding of our contract with regards to territorialities. In the original contract the only words used were '"all countries of America, North of Panama Canal".' In this we meant all the countries of the continent of America, North of Panama Canal and nothing else.

"'It is obvious that the isles which are French colonies belong to our sector and that the isles which are colonies of Great Britain or under the English protectorate belong to the British Sector.—

"'There may be no doubt whatever with regards to this understanding.

"'As the question has arisen through this conversation through Mr. Hanbury-Williams, and although the mar-
3606 ket of these isles is of very little importance, the misunderstanding must be cleared at once to avoid difficulties with Messrs. Courtaulds and also to put aside any possible difficulties in the future.

"'We shall be glad to have your immediate confirmation of this as it is essential for us to clear the position now.'

"In the agreement of January 6, 1923, which was simply an agreement to investigate the possibilities, the references are made to North American continent and Central American countries.'"

Then there is reviewed provisions of that agreement relating to territorial rights of duPont and of the French.

"From the foregoing it resolves itself to the question did Du Pont acquire anything beyond the continental portions of North and Central America? The Management of DuPont Cellophone Co. has operated on the assumption that its territory was not only the continental part of North and Central America, but the islands adjacent thereto, such as Newfoundland, the Bahamas, and the Greater Antilles. We admit doubt as to the Lesser Antilles.

"When we speak of '"our territory'" and what was comprehended in purchasing it, it is the conviction that the purchase included both manufacturing and sales rights and that La
3607 Cellophone in creating additional licensees are obligated to preserve to Du Pont both manufacturing and sales rights in such territory. It is without our province to yield the territory or to make claims to it without your sanction.

"The Management feels the question is one to be settled between the Parent Company and Arena Trading Corporation.

"To accept Mr. Bernheim's view, we had no right to license Newfoundland to C. I. L."—Canadian Industries Limited—"and we have no right in the American colony of Puerto Rico or in Cuba. Our activities in these countries, as in the Philippines, have never before been brought into question. We attach sales made this year in export markets. Obviously the market in many of the islands will be negligible—not only for us but for anyone else. On the other hand, if valuable at all, they will be as valuable to us as to anyone else.

"L. A. YERKES, *President*."

Then there is listed sales of cellophane during 10 months ending October 31, 1934 in British Honduras, Cuba, Dominican Republic, Haiti, Hawaii, Jamaica, Philippines, and Puerto Rico, and I would like particularly for your Honor to direct his attention to the paragraph which says:

"When we speak of "'our territory'" and what was comprehended in purchasing it, it is in the conviction that the purchase included both manufacturing and sales rights and
3608 that La Cellophane in creating additional licensees are obligated to preserve to Du Pont both manufacturing and sales rights in such territory. It is without our province to yield the territory or to make claims to it without your sanction."

So it is a purchase of territory the terms of which duPont speaks with regard to the territory which they claim as their own for exploitation of cellophane.

3609 Now, further with regard to this question of this territory of duPont is Exhibit 1034, which I offer in evidence.

(Letter from W. S. Carpenter, Jr., to Mr. Rene Bernheim dated December 13, 1934, was received in evidence and marked "Government's Exhibit No. 1034.")

Mr. TUBRIDY. This is a letter from Mr. Carpenter to Mr. Bernheim, dated December 13, 1934, in which he presents duPont's views with regard to the right of duPont to have the islands adjacent to the North American continent included in duPont's territory.

Mr. Bernheim replies to Mr. Carpenter's letter under date of January 31, 1935, by Exhibit 1038, which I offer in evidence.

Government's Exhibit 1038

(Letter from Rene Bernheim to Mr. Carpenter dated January 31, 1935, was received in evidence and marked "Government's Exhibit No. 1038.")

Mr. TUBRIDY. It reads:

"PARIS, *January 31, 1935.*

"Dear Mr. CARPENTER: Please excuse me for not answering before your lines of December 13th."

The COURT. Could I glance at the Carpenter letter for just a moment?

Mr. TUBRIDY. Yes, sir.

The COURT. Proceed sir.

3610 Mr. TUBRIDY. Continuing:

"The delimitation of the territories is indeed a rather complicated matter.

"As I took an active part in the negotiations which were led with your company at the time of the original contract, I can tell you that in using the words: all territories North of Panama Canal, we really meant all the continental territories.

"When later the question came up here to work the Cuban market, we realized that the du Pont Company seemed to be in a better position to do so and the Sales Department of the French Cellophane Company wrote you accordingly.

"No resolution to definitely abandon the territory of Cuba to the Du Pont Cellophane Company was passed on the French board.

"It was also never our idea to abandon definitely the Philippine Islands, whereas we thought it was quite natural that Newfoundland was to be included in your territory because of its immediate proximity.

"Now, I first of all would like you to refer to the conversation I had, end of last December, with Mr. Pickard with regards to the Du Pont Cellophane Company sales in South America. You will remember the reasons why you asked us to give the Du Pont Cellophane Co. half of our share on the sales of cellophane in
3611 South America and Japan; since then the situation has changed to a certain extent and we think that these rights should really be returned entirely to the French Cellophane Company. This arrangement has not worked to mutual satisfaction, it may be through misunderstandings, but probably because of the difficulty of its application. Mr. Yerkes and Mr. Hatt will certainly tell you that we exchanged correspondence about this question. In fact, the sales made in South America of the Du Pont Cellophane Co. were much in excess of the quantity to which they were entitled which meant a complication between the Du Pont Cellophane Co. and ourselves, and between ourselves and the other producers of transparent paper with which we have been in agreement, and we do not, in fact, see how we can settle these difficulties.

"My suggestion is, as explained to Mr. Pickard, that the Du Pont Cellophane Company retires from the South American markets and to definitely fix the Du Pont Cellophane territories as approximately outlined in your letter, therefore including all continental North and Central America, north of the Panama Canal, together with the islands immediately adjacent, together with Newfoundland, Cuba, Haiti and all the present possessions of the United States in the West Indies and the Pacific, but excluding all the possessions or territories of France, or Great Britain, or European powers in the West Indies or the Bermudas.
3612 "You will see that this wording is lightly changed as we would not like to automatically agree to additions of other territories, should the United States take possessions of other countries somewhere in the world.

"I have discussed this question with different members of the board of the French Cellophane Company and I am of the opinion that this proposal, if officially presented to its next meeting, would be approved by its members.

"Will you kindly consider this suggestion and let me know your opinion."

I would like in particular, your Honor, as you might have gathered by the emphasis which I attempted to put on it, call your attention to the end of the top of the paragraph on page 2, indicating the sales of Du Pont Cellophane, that they weren't living in accordance with the terms of the quotas with the understanding of La Cellophane of France, which was causing embarrassment for La Cellophane with its members of this entente

cordial, and the embarrassment is what was bringing about this request that they reconsider the whole situation.

Now, the Government offers in evidence Exhibit 1039.

(Memorandum from J. K. Jenney to Mr. W. S. Carpenter, Jr., dated May 20, 1935, was received in evidence and marked "Government's Exhibit No. 1039.")

Mr. TUBRIDY. This is another phase of the situation with regard to this ancillary provision of the contract. If your Honor
3613 will recall, La Cellophane and its affiliates were not to engage in the cellophane industry before December 31, 1935. Now the date is approaching and we have here a memorandum dated May 20, 1935. It would appear from that agreement that La Cellophane could engage in the cellophane industry in the United States. That would be your first reaction in reading this provision, but as you read further and you see duPont's construction of it—"No indeed, La Cellophane can't come into the United States."

This is dated May 20, 1935, a letter from Mr. J. K. Jenney, Assistant Director, to Mr. Carpenter:

"Mr. B. M. May and I reviewed the Cellophane contracts in his office last week. It is true that the commitment of du Pont Company and La Cellophane not to go into the Cellophane business in North America outside of DuPont Cellophane Company terminates December 31, 1935; however, under the technical agreement between DuPont Cellophane and Soc. La Cellophane, DuPont Cellophane has an exclusive license to all of the French patents and technical information and they have no rights to use our information in this country. We, therefore, feel that as a practical matter, it would be impossible for them to engage in the Cellophane business on the North American Continent even after the cancellation of our technical agreement if they wished to go to that length."

The COURT. Will you clarify for me this distinction which Mr. Jenney tries to make about the technical agreement?

3614 Mr. TUBRIDY. May I suggest, sir, that we go to the next document, or the one thereafter, and they explain how they get to this position.

The COURT. Very well.

Mr. TUBRIDY. The document is Exhibit No. 1041, sir. I think it might be helpful if we review that. I would like to offer in evidence Exhibit 1041 appearing at page 1077, dated May 21, 1935, addressed to Mr. Carpenter and signed by Mr. Spargo.

(Letter from Mr. C. M. Spargo to W. S. Carpenter, Jr., dated May 21, 1935, was received in evidence and marked "Government's Exhibit No. 1041.")

3615 "Referring to the agreement of June 9, 1923, between E. I. duPont de Nemours & Company, and Arena Trading Corporation, which agreement sets forth the terms and conditions upon which DuPont Cellophone Company was originally organized, you are advised that I have examined numerous files of this Department and the Development Department for the purpose of determining the reasons which may have prompted the parties to incorporate paragraph 11 into the agreement in question.

"Paragraph 11 provides as follows:

"'11. Subject to the rights reserved to the party of the second part in Article 9 of this agreement, neither the party of the first part, nor the party of the second part, or its associates, including Societe La Cellophane, or any corporation controlled by any of them, shall, prior to December 31, 1935, except by or through Du Pont Cellophane Company, Inc., engage in or become directly or indirectly interested in any other business or enterprise on the North American continent, or in Central America, engaged in the manufacture of cellophane, either as stockholder, principal or agent, or in any other capacity.'

"Construing this paragraph literally, it would appear that inasmuch as both parties are prohibited from engaging in the business prior to December 31, 1935, it may logically be assumed that the paragraph should be construed to mean that both parties are free subsequent to December 31, 1935.

3616 "As stated to you orally, my recollection does not serve me sufficiently to remember by which side this provision was proposed but in so far as correspondence on the subject is concerned, there is no evidence that there ever was any discussion on the subject.

"It appears that early in December, 1922, Dr. Sparre, Col. Spruance and the writer presented a proposed draft of the contract to Messrs. Paskus and Gillette in New York. It also appears that at the same time, Mr. Paskus presented a draft and comment was made as to the close resemblance between the two documents.

"Subsequent to the initial meeting, a great deal of correspondence was exchanged and suggestions were presented by both sides concerning various provisions of the agreement, but there is no record with respect to paragraphs 9, 10, and 11, except that those paragraphs were apparently incorporated in the original draft and were carried over into the final agreement, as well as the supplemental agreement which was executed upon the reorganization of the Cellophane Company.

"My study of the contract, which has been more careful than any former examination, prompts me to considerably modify any opinion formerly given to the effect that subsequent to December 31, 1935, the French interests are free to engage in the Cellophane

business in the territory of Du Pont Cellophane Company under paragraph 11.

3617 "I am now of the opinion that such is not the construction to be placed on this paragraph, if all of the provisions of the agreement are to be construed together.

"Paragraph 9 of the contract provides, among other things, as follows:

"'It is the understanding and intention that this agreement shall operate to transfer to du Pont Cellophane Company, Inc. an unqualified, unrestricted and exclusive right to use all and every process now owned by the party of the second part, or its associates, including Societe La Cellophane, or which may hereafter be acquired by it or them in connection with the manufacture of cellophane * * *.' (here follow some exceptions which are not material to this discussion).

"The foregoing language of paragraph 9 can only be construed in accordance with the ordinary meaning of the language, and the entrance of the French Company into business in this territory on its own account, after December 31, 1935, would certainly be contrary to the right which is defined as unqualified, unrestricted and exclusive.

"Paragraph 10 provides as follows:

"'10. After July 31, 1923, the party of the second part shall cease to market, sell, or in any manner offer for sale, either directly, or through any agency, except Du Pont Cellophane

3618 Company, Inc. any cellophane within the territory aforesaid; but Du Pont Cellophane Company, Inc. shall act as the agent of the party of the second part for the purpose of supplying its customers within the United States, or any other portion of said territory until such time as Du Pont Cellophane, Inc. shall be in a position to supply said customers, after which time such customers shall become the customers of Du Pont Cellophane Company, Inc.'

"It is clear that if the French, under paragraph 11, may come into America and engage directly in the cellophane business, subsequent to December 31, 1935, there would have been no purpose whatever accomplished by the insertion of paragraph 10 and it is a general rule of construction that all of the provisions of an agreement must be given effect in so far as possible.

"It is my opinion that paragraph 11 was directed mainly to prohibiting both parties from acquiring interests in businesses competitive with cellophane and which might assume such proportions as to claim more attention and interest than the operations of Du Pont Cellophane Company; in other words, a stock interest such as buying a substantial part of the stock of the Sylvania Corporation.

"I, therefore, believe, although the language is far from satisfactory, that a fair interpretation of paragraphs 9, 10 and
3619 11, which paragraphs were expressly referred to in the supplemental agreement executed upon the reorganization of Du Pont Cellophane Company, would not permit La Cellophane to directly engage in the Cellophane business in North America on its own account and that under paragraph 11 La Cellophane may, subsequent to December 31, 1935, become interested financially in other concerns engaged in such business, something which it could not do prior to December 31, 1935.

"This, to my mind, is the necessary interpretation, if the other provisions referred to above are to be given any effect at all.

"With reference to what our policy should be, it is my feeling that nothing should be said to the French interests about the subject. I believe we have by far the best of the argument should the question ever arise, and to approach them on the situation now would be merely to place in their minds a possible interpretation of the agreement which would be adverse to our interests."

The COURT. As a lawyer, do you agree with this Spargo interpretation?

Mr. TUBRIDY. Well, if he wants to give meaning to these three paragraphs and completely disregard the other paragraphs his logic is perfect. He eliminates the paragraph and says he can't engage in business prior to December 31. If that is not in the contract it is wonderful.

The COURT. What would be your interpretation?

3620 Mr. TUBRIDY. I think it was a good contract, sir. They put up an ancillary agreement——

The COURT. Do you think the French could have come in after 1935?

Mr. TUBRIDY. Without doubt, sir.

The COURT. Without doubt?

Mr. TUBRIDY. Certainly.

The COURT. To that extent your interpretation as a lawyer is different from the Spargo?

Mr. TUBRIDY. Well——

The COURT. Not that either one of you are right. I don't have to judge that. I am just interested.

Mr. TUBRIDY. I can't be too emphatic, sir. I am trying to reach for words to describe my differences with Mr. Spargo. As an anti-trust lawyer and having some familiarity with ancillary restraints, the men who drew that contract knew what they were doing. Mr. Spargo said he doesn't think they knew what they were doing. They were providing an ancillary restraint in there which would provide some validity in connection with an anti-trust action.

I am not going into that too deeply, but those are my offhand comments in connection with it.

I would like to go back to what I have been discussing before and offer in evidence Government's Exhibit 1040 at page 1074.

3621 (The letter of May 21, 1935, from Mr. May to Mr. C. M. Albright, and the attached memorandum, were received in evidence and marked "Government's Exhibit No. 1040.")

Mr. TURRIDY. This is again another letter in reference to the territorial rights of duPont. The first page is from Mr. May to Mr. Albright which recites, "The attached memorandum of May 21, 1935 having reference to the territorial rights of the Du Pont Cellophane Company should be in your files for reference. I am sending copy of this letter and the memorandum to"—various other individuals.

The second page is headed "Memorandum, to be attached to original contract between E. I. duPont de Nemours & Company and Arena Trading Corporation of June 9, 1923.

"May 21, 1935.

"In negotiating a technical agreement between Du Pont Cellophane Company and British Cellophane Limited there arose a question of the respective territory of the parties which necessitated an understanding between E. I. duPont de Nemours & Company and Area Trading Corporation as to the territories covered by their agreement of June 9, 1923. The matter was referred to Mr. W. S. Carpenter; the following correspondence resulted:

"Letter Dec. 13, 1934 from W. S. Carpenter to R. Bernheim,

"Letter Jan. 31, 1935 from R. Bernheim to W. S. Carpenter,

"Letter May 2, 1935 to R. Bernheim to W. S. Carpenter.

3622 "Letter February 18, 1935 to W. S. Carpenter to R. Bernheim.

"The salient paragraphs of the foregoing are the second before the last paragraph of Mr. Carpenter's letter of February 18, 1935 which reads:

"'From what I have said in my previous letters, together with what is maintained above, it seems to me clear that what was contemplated by du Pont territory was all of North America above the Isthmus, including the adjoining islands, the West Indies and the American possessions in the Pacific. If it is your feeling, however, that there is some doubt with respect to the possessions or territories of France or Great Britain or other European powers in the West Indies and the Bermudas, I would agree in the interest of getting this question of territory rather more definitely defined to waive any rights that we may have to these possessions of the

European powers in the West Indies and the Bermudas,' and the third paragraph of Mr. Bernheim's letter of May 2, 1935:

"With regards other territories, we agree with the suggestions contained in the last part of your letter that du Pont territory is composed of: North America above the Isthmus, including the adjoining islands and the American possessions in the Pacific with the exception of all territories belonging to European countries, or Great Britain.

3623 "It must be kept constantly in mind that these references are to the agreement of June 9, 1923 between E. I. du Pont de Nemours & Company and Arena Trading Corporation.

"The territory thus defined in the correspondence of reference was further extended in 1930 as a result of the Sidac, Sylvania developments, all of which is of record in the Minutes of the Du Pont Cellophane Co. Inc. under date of May 8, 1930 and which has also been filed with the Secretary of E. I. duPont de Nemours & Company.".

The next three documents are also in connection with the operation of this Du Pont Cellophane agreement and also shows the effect upon Sidac having come into the picture through the deal which had been worked out between La Cellophane and Sidac, and we find——

Mr. GESELL. Which one are you talking about?

Mr. TUBRIDY. 1042, 1043, and 1044.

Mr. GESELL. Are you going to offer them?

Mr. TUBRIDY. Yes. I offer Government's Exhibits 1042, 1043, and 1044 in evidence.

(The letter of January 5, 1939 from J. E. Hatt to Mr. J. E. Brandenberger was received in evidence and marked "Government Exhibit 1042.")

(The memorandum dated January 12, 1939, headed "La Cellophane Agreement-Sidac" was received in evidence and marked "Government's Exhibit No. 1043.")

3624 (The letter dated February 7, 1939, from J. E. Brandenberger to Mr. J. E. Hatt was received in evidence and marked "Government's Exhibit No. 1044.")

Mr. TUBRIDY. Exhibit 1042 is a letter from Mr. Hatt to Mr. Brandenberger dated January 5, 1939, which states:

"Your letter of October 27th regarding the Italian Sidac situation in relation to moistureproof 'Cellophane' has been brought to my attention for consideration.

"My files are apparently incomplete, as I find that I have no copy of your license to the Belgian Sidac under the Belgian patent, nor whether you have given them the right to license others, and in attempting to determine our position on this it would be of interest to me to see a copy of your license to Belgian Sidac and

I hope it will be in order for you to send me this as promptly as possible.

"We are not certain that further licenses under either the Belgian or Italian patents, without a restriction as to territory which might be sold, would be in our interest, and I would appreciate your comments as to how you feel this might operate.

"I hope, therefore, that you will be good enough to send me a copy of the license asked for and promptly on its receipt we will review the matter further and endeavor to advise you our thoughts in the matter.

3625 "I take occasion at this time to wish you the compliments of the holiday season, and beg to remain

"Yours very truly,

"J. E. HATT,
"*Division Manager.*"

3626 Government's Exhibit 1043, dated January 12, 1939, is signed by Mr. Pralatowski and is entitled, "Memorandum, La Cellophane Agreement—Sidac." It reads as follows:

"The La Cellophane agreement calls for the assignment of the entire right, title and interest to certain inventions to La Cellophane in certain territory. In due time, the Charch & Prindle British, Italian, and Belgium patents issued and specific licenses were granted to La Cellophane under them.

"These licenses gave La Cellophane the exclusive license to use the invention without specifically saying that they could sell or assign or sub-license. In the big meeting called by Mr. May on January 5, 1939, the lawyers pretty generally thought that the specific license was necessarily governed by the main agreement and that since the main agreement spoke of assignment, La Cellophane had exclusive title to the Charch & Prindle invention for viscose film in France according to the agreement to do with as it pleased. Mr. May felt the same way for equitable reasons, Mr. Yerkes, as I remember it, would not quite go all the way, and Dr. Sparre very definitely objected. It was his thought that they had the unquestioned right to use in any way that it might affect their business, but that if it came to selling out the license or sub-licensing, they would have to come back and get our consent.

"In 1930, La Cellophane had got themselves into difficul-
3627 ties by taking an interest in Sidac which, in turn, owned part of Sylvania. As reparation we got the joint right to exploit in South America and Japan. La Cellophane agreed in this understanding that they would see to it that none of du Pont's inventions or patent rights go to Sidac. I can say that this understanding was that none of du Pont's confidential information or know-how would get to Sidac and that it did not mean to say that

an empty license under a French patent in which La Cellophane had the unquestioned jurisdiction would be involved.

"In any event, as time went on, La Cellophane apparently did grant a sub-license or did assign their license to Belgium Sidac. There is a question, therefore, as to whether they exceeded their rights of the La Cellophane agreement and as to whether they breached the specific 1930 agreement. There is a question as to whether in granting Sidac a license, they were careful to circumscribe them as they, themselves, were circumscribed by the main agreement insofar as territory is concerned. The evidence indicates, although it does not prove, that they did not do this because of the fact that Sidac is selling moistureproof film in South America.

"At the present time there is an infringer in Italy. The Belgium Sidac who have the right for Italy cannot very well sue the Italian infringer and win because of the nationalistic attitude of the Italian courts. It has proposed that Belgium Sidac,
3628 therefore, transfer the license to Italian Sidac, and Italian Sidac do the suing. This transfer has not heretofore been made because it was felt that Italian Sidac might jump over the traces and sell its material in territories where it should not.

"The whole matter is on our desk today because La Cellophane is asking us if we have any objection to Italian Sidac getting control of the Italian patent and suing the Italian infringer. There was a very long discussion of all elements of this thing and Mr. May felt that whatever may be the legal irregularities, the practical conclusion was that if anything is to be salvaged from the Italian situation, Italian Sidac better get title to the license and sue the Italian infringer and that in the doing of it, Italian Sidac and Belgium Sidac ought to be made to under that their territorial rights are no different from La Cellophane's. Mr. Hatt was instructed to write to La Cellophane and get from them a copy of the license from La Cellophane to Belgium Sidac and a copy of the proposed license from Belgium Sidac to Italian Sidac in order that we might see what provision was actually made in our interest on territory. The chances are that there might be some sort of a formal fracas about La Cellophane's actions but that in the final analysis we will approve doing what they wish to do."

Government Exhibit 1044 is a letter from Mr. Brandenberger to Mr. Hatt, dated February 7, 1939, and reads:

3629 "This is to acknowledge receipt of your letter of January 5 concerning the license for moistureproof, granted by us to the Belgian Sidac.

"In this connection I can do no better than to quote in full Paragraph 7 of the agreement entered into with Sidac of Belgium.

This paragraph relates to the matter in hand:

"'This license for Du Pont Cellophane Co.'s moistureproof is granted to Sidac for its Belgian and Italian factories, Sidac agreeing not to sell these goods in South America or in Japan.

"'On the other hand it is specified that Sidac may not sell the said goods in South America excepting as such sales may not be opposed by Du Pont Cellophane Co.; similarly in the Orient, in so far as may be agreeable to Kalle and Co. The Cellophane Co. will undertake to obtain any such agreements.

"'It is stipulated that the grant of license for moistureproof carries no guarantee that the patents are valid and does not provide freedom from technical competition.'

"I believe the text is clear enough not to need any comment but if, contrary to my expectations, you need additional information I shall be happy to supply it.

"Another resource, Mr. Rene Bernheim is going to the United States next month and he will be able to give you any information which may seem useful to you."

I think that terminates that particular group, and I suppose Mr. Gesell would like to make some comments.

3630 MR. GESELL. I have one or two.

Your Honor, I am anxious to keep the record straight with respect to this problem of our objections to exhibits. Of course the Anti-Trust Division can try their case as they see fit, but I want to point out to your Honor that of the 44 documents in this section, 15 of them were omitted. Now, that is all right. That helps to reduce the irreducible minimum that we heard a lot about at pre-trial.

The COURT. Don't be so hopeful because Mr. Tubridy said he may use them at some other place and time.

Mr. GESELL. Of course under pre-trial order he was supposed to use them now. But that is all right. All I want to emphasize to your Honor, if I may, is that we framed our evidentiary objections on the assumption that the documents would be offered, and in some cases the Government has so far omitted to discuss documents which are attached to documents that they did discuss, and have taken other liberties with the evidence which we wish to mention, in order that your Honor is apprised of the fact that we feel we should be entitled to consider further objections to this group for discussion at the appropriate time in the light of the procedure that has now been followed with respect to the exhibits.

The COURT. I understand your position.

Mr. GESELL. I would like to discuss this group of docu-
3631 ments, if your Honor please, in two sections. I would first like to state our general position and then review the specific documents which we have been going over all day. I think it

easier to discuss the specific documents in the light of a statement of our over-all position and contention on this phase of the case.

DuPont says it never joined any European cartel, that it lived up to specific contractual obligations, and except as required by those contractual obligations it made no further commitments or arrangements with La Cellophane and the group of European cellophane producers who were having meetings and arrangements and discussions of different kinds at different times with La Cellophane. The basic contracts are the contracts which I reviewed with your Honor this morning.

Just so we have it perfectly clear, La Cellophane held secret processes covering a proved method of commercial manufacture of cellophane. Du Pont Cellophane, the joint venture, received the exclusive rights to those secret processes for North and Central America and received the commitment that La Cellophane would not dilute those exclusive rights by licensing someone else, and that it would not engage in the business itself in the United States. Now that meant that as long as Du Pont used the secret processes of the French, which they were contractually bound to keep secret, they could not sell outside of North and Central America——

Mr. MINICUS. Your Honor, I would like to interpose,
3632 if I may at this time, that there has been no proof of any secret processes in this case as yet. There has been Mr. Gesell's assertion that these processes were secret. We know that there were people throughout the world who were manufacturing cellophane by the time his narration——

Mr. GESELL. Well, I don't think his narration had anything to do with it. Your Honor, there is proof of it, and I will come to it.

We say that as long as we manufacture under those secret processes, we were contractually committed not to sell outside of North and Central America.

Now, it is in that legal agreement framework, and we think it is entirely proper agreement framework, that all of these documents that we have been discussing must be reviewed.

What started this fracas? I made a statement in response to a question of your Honor that La Cellophane's secret information was stolen by Sidac. That statement is supported by the record already in this case at two places, in Exhibit 1 and again in Exhibit 1010, where the references are made to the pirating of the French process. The evidence shows that two employees of La Cellophane, without authorization, in violation of their duties, went and formed Sidac. And if we have any question as to the secret character of the information, or the importance of it, we have it in evidence that La Cellophane sued Sidac
3633 in the Belgian courts for pirating this information and was

granted a judgment. It not only proceeded to protect its secret processes but the Courts of Belgium where the event occurred said that Sidac had no right to the secret processes. It turned out that Sidac could not pay cash to La Cellophane, and La Cellophane in settlement of this breach of its rights took stock in Sidac, and Sidac had helped to form Sylvania. There at that moment was a direct breach of the basic Du Pont-La Cellophane contract, because La Cellophane as the owner of shares in Sidac became directly interested through Sylvania in the manufacture of competing cellophane business in the United
3634 States in violation of its contractual obligations. That is what this fuss was about, and duPont was not going to ignore the breach of the contract. Not only had La Cellophane's information gotten off here improperly, but through no fault of La Cellophane, and it was confronted with no longer having exclusive rights to that information. Both Sylvania and duPont now had it. But there was the specific breach of the contract, the entry of La Cellophane through Sidac into the business of cellophane manufacture in the United States.

We have a bunch of documents here, some of which were read to your Honor at this particular time, which discussed ways and means of duPont getting retribution for this violation of its contract rights. The question of a cash settlement was discussed in some of the documents. There was discussion of whether or not shares should be acquired in Sylvania. Then there was discussion of, "Why can't we use this to expand our territorial rights? They have broken the agreement. Why can't we put that up to them and get some broader rights?" And after much chitchat back and forth within the company and the suggestion of various methods of resolving this issue, Mr. Yerkes made his position clear in the document that was read to your Honor, that duPont should seek broader rights, and an agreement with La Cellophane was negotiated, giving duPont equal rights with La Cellophane as to plain cellophane in South America and on certain contingencies in the Orient. That was a broadening of the license rights
3635 which duPont had to La Cellophane's process, secret process, which it was using and continuing to use throughout this period, and duPont was thereby authorized to sell not only to Central America, where it had had rights before, but also into South America; and your Honor recognizes that throughout this time Du Pont Cellophane Company is functioning and La Cellophane's representatives and DuPont's representatives are sitting together as managers of the American company. The technical agreement between the French and the American Du Pont Cellophane Company determined these rights.

Now, the reason that there was so much discussion in these documents of the rights of other foreign producers came about from a very natural course of events. La Cellophane was licensing its inventories to others, and to the extent it had licensed others in markets outside of North and Central America it had precluded itself from broadening duPont's own rights, and duPont constantly sought to get the broadest rights which La Cellophane had to grant. There were many efforts in Europe to form a cartel. La Cellophane participated in those efforts. There was much discussion of quotas and prices and other things in the European manner. But duPont never joined those agreements and was only concerned that to the extent La Cellophane had reserved any market itself it gave duPont rights in retribution for the violation of the contract which occurred when it took a stock interest
3636 in Sylvania through Sidac. This is not concerned with imports into the United States. In this period of discussion not only did the prohibitive tariff exist and the moistureproof patent exist, but duPont's prices were rapidly decreasing and its production was rapidly expanding, as was Sylvania's. This was concerned with duPont's efforts to broaden its rights and get more room to sell abroad. It tolerated Sylvania and Sylvania prospered; but it took strong steps to see that its information did not go to its competitors in the United States—a wholly proper thing to do—and insisted that if La Cellophane in pursuance of its own private European activities wanted to license Sylvania in some way, it could not pass on duPont information which would come back home and be used at home against it, and that was proper protection of its rights, of any secret processes of its own development.

That, if your Honor please, is the broad outline of our position with respect to this phase of the case. I think by going through these documents I can call your attention to various portions which support, explain and expand that general thesis.

The first document to which Mr. Tubridy referred was Government Exhibit 1007. I think the main point I would like to emphasize about this document is that everything that this Frenchman proposed and talked about with his colleague in New York never happened, and I think if you see that in clear
3637 perspective it will be apparent that duPont was not interested in going along with some of the suggestions that came from France.

For example, there is the discussion toward the bottom of the first page about being ready to enter into a complete technical and commercial agreement apportioning production and dividing territories and equal sales prices. That was not done.

You will notice at the top of page 2, the first paragraph, that Mr. Van Ham was willing to admit in principle that there should be an indemnification of duPont for damages by handing over some of the shares. That was not done. duPont never took any shares in Sidac, and I don't think Mr. Tubridy meant seriously to contend that we did.

In the next paragraph it says, "He also agreed, in principle, to an agreement between the Du Pont Cellophane Company and his company as well for the limitation of production by his American company as for the conditions of sales of cellophane in the United States." That was not done. This is concerned at this early date with the product plain cellophane as to which there were no limitations of any kind.

Then in the fourth paragraph there is discussion of conversations to be had between Wallach and the Du Pont Cellophane Company to study the basis of an agreement. That
3638 was never done, as this evidence shows.

Then four paragraphs from the bottom the reference again to our demanding that the Belgian cede founder's shares; and in the last two paragraphs a suggestion that if we could not take these shares under American law, then perhaps La Cellophane could take them and hold them for us. That was never done.

The suggestion that there be a 10% limitation by number of machines on the American company Sylvania. That was never done.

On the third page a discussion of leaving it to explain to Yerkes the propositions that are going to be put forth with respect to sales of cellophane and prices and excessive competition. That was never done.

Down at the bottom the suggestion in the P. S. that there be technical cooperation and a reciprocity between Sylvania and Sidac and duPont. That was never done. I think you have to judge duPont by what it did and not what somebody said in a letter that he wrote to somebody else that got into duPont's files.

All through the reading of these rather carefully selected excerpts from carefully selected letters, we got no indication from Mr. Tubridy of what the significance of this was. Does he say we did these things? That is an issue we can meet. Or does
3639 he say it was evil for us to read the letter? These things were not done. This was a letter written by a man abroad in a context of arrangements there. We were not party to them. This letter is dated October 25, 1929, and it is the first time that this problem, so far as this record shows, came to our attention; and by January 1930, two months later, in Exhibit 1010, we find

Mr. Yerkes saying, "By golly, let us take advantage of this and go out and get some more territory for ourselves." He is not talking about deals with Sylvania, price-fixing arrangements, quantity limitations. Let us go out and get some more business for ourselves," within two months.

The next exhibit discussed was Exhibit 1010. Exhibit 1411, which comes in the sequence before it, was not discussed. Why, we don't know.

Mr. MINICUS. What was the number of the exhibit, please?

Mr. GESELL. 1010.

Mr. MINICUS. The one that we did not discuss.

Mr. GESELL. Exhibit 1411.

Mr. MINICUS. Thank you.

3640 Mr. GESELL. Here we have two proposals being bruited
about during the Du Pont organization as to what should be done to settle this Sidac mess, resulting from what is called in the memorandum and what was, I think, termed in a very polite way, the pirating of the French process. Mr. Carpenter says, "Sylvania is here, there is nothing we can do about it. We better live and let live and see if we can't work out some kind of a financial settlement that will cut Sylvania off from Sidas so they can't get any more of our information through the French and give us some financial return for the violation of the contract that has taken place." But that wasn't done——

The COURT. I cannot follow this. You say violation of the contract, and on the other hand you say there was a theft by Sidac. Now if somebody steals my property and I have a contract with Mr. Minicus, I don't think I have been guilty of breach of contract if he takes my property.

Mr. GESELL. There are two separate things.

The COURT. Well, explain it.

Mr. GESELL. May I explain that again, your Honor.

The contractual violation occurred when La Cellophane took stock in Sidac and Sidac took stock in the American company, Sylvania, because La Cellophane then became interested as a shareholder in a competing business in the United States. That was the contractual violation. It was not a contractual violation that the information was stolen from La Cellophane by
3641 Sidac. That fact only explains how the stock acquisition
took place, and the stock acquisition was the violation of the contract.

The letter shows, among other things, Mr. Carpenter's desire to keep Du Pont information from going to Sylvania, a wholly legitimate and proper position for him to take.

Then we see on the last page that Mr. Yerkes, who was the boss of this Du Pont Cellophane operation—Mr. Carpenter was more concerned with the activities of the parent company—Mr. Yerkes was the fellow who was running the business—and he is talking about going out and forcing an expansion of Du Pont's territory, that the French had held us to this area, and he believes, here is a chance to go out. And is he talking in terms of cartels and monopoly when he says, "I would prefer to forego cash compensation and the separation of Wallach's American company technically and otherwise from the Belgians in return for permission to sell cellophane in open competition in the markets of the world"? That doesn't sound like a cartelist talking. And this is the memorandum that was sent to the French indicating a position we were prepared to take to settle this contractual violation.

Of course there quickly came a telegram back saying, neither of these proposals were agreeable to the French. So all that had to do, as 1011 shows, with possibilities that were put forward that couldn't be worked out.

3642 Now, at this stage between the two exhibits, if they ever do come in, are two more that were not discussed, Exhibits 1413 and 1415.

In Exhibit 1011 came a proposal from Mr. Pickard back, which was never taken up. He suggested forming a company through which everybody would sell, but that suggestion was made by him from the field, never acted upon at Wilmington affirmatively in any way and no such company was ever organized, in which duPont had any participation.

1416 next comes in before Exhibit 1012, another one that was not discussed, which they may get to. This is a memorandum from the files by Mr. May, not addressed to anybody, dated February 14, 1930. We don't know whether he sent to anybody or whether he was just thinking out loud.

The COURT. Well now, certainly the duPont Company doesn't have its officials write soliloquies and put them in the files.

Mr. GESELL. Well, it is very odd, your Honor. I don't think the company does. But I think Mr. May had a habit of writing memoranda on a piece of paper and showing them to Mr. Yerkes as a way of getting his thoughts lined up, and I think that was probably what this was. It was kept in the files and it is a document that has to be considered by the Court. I was simply pointing out that it was what you might call a think memo-

3643 randum rather than anything else. There are several of these in the case, and I believe one of them, if I recall correctly, by Mr. May is addressed, "Memorandum to myself" which does suggest that that is the sort of thing he did sometimes.

The COURT. Well, did he answer that particular memorandum?

Mr. GESELL. Not as far as the record shows, your Honor.

He reviews the developments—this is now February, 1930—and seems to be going along the same line that Mr. Yerkes was taking, and that Mr. Carpenter was taking, that nothing could be done about the fact that Sylvania was set up in business and getting under way on plain cellophane, and that the job in hand was to get an opportunity, as he says at the bottom of the page, to enlarge our territory—"Any business we may get outside of the territory we have purchased would help to compensate us in a small way for the dilution of our territory by Sylvania." He talks in indignant terms as being the rightful owner of the business, as indeed he thought he was, because that had purchased exclusive rights to the process, which was no longer exclusive.

The COURT. I think I will take a five-minute recess.

(At this point a short recess was taken.)

3644 Mr. GESELL. The next exhibit is Exhibit 1013. That is the three-page document signed both by Mr. May and Mr. Bernheim relating to the new territories that are opened up as a result of the discussions which Mr. May had with the French. Your Honor will note at the bottom of page 2 of that document that Mr. May says that inasmuch as Mr. Pickard wants to return home at once and that he and Mr. May are planning an early departure, they would like to have La Cellophane's advice. I think it is clear from that and other documents that are coming along that that this document was drawn abroad, at Paris, as a result of negotiations which Mr. May had there, and you will note that Mr. May states at the third page of this Exhibit 1013 that the entire document is subject to ratification by the Boards of Directors of the respective companies. That is also stated, to give the matter double emphasis, at the end of the first paragraph of the letter.

If I may simply go through the chain of documents a moment before returning to this, Exhibit 1014 shows that after Mr. May got back he sent to Mr. Bernheim the resolution of the Du Pont Cellophane Company Board to which he had reported with respect to his negotiations. That resolution is Exhibit 1015, which Mr. Tubridy offered, but did not discuss.

Then in Exhibits 1016 and 1017 we have the letters from the Comptoir acknowledging the resolution that was sent apparently with this letter of May 13, 1014.

3645 Now, the point of all this is simply that the resolution, Exhibit 1015, is in several particulars a somewhat different document than the earlier negotiated memorandum which Mr. May arranged when he was in Paris and made subject to consid-

eration by the Board of the Du Pont Cellophane Company. Not only is it free of any references to past agreements, but it talks in terms of duPont having equal rights in South America, not in terms of a 50% allocated quota, and I will be able to show you from other exhibits which were discussed by Mr. Tubridy that that is in fact the way it worked out. No quotas were observed. DuPont sold all it could in South America, and it recognized no obligation to compensate the French for overselling the amount that it would have been allowed had there been a 50% quota.

This settlement, of course, was contingent on the arrangements which La Cellophane could make with some of its licensees. It had, for example, licensed; as it worked out, China to the German company, as the result of which Du Pont Cellophane never got any rights in China, though that had been contemplated by the arrangement. But as a result of Mr. May's negotiations the territories licensed to Du Pont Cellophane under the technical agreement between La Cellophane and Du Pont Cellophane Company were expanded to include South America, and duPont sold in South America, and that was the compensation which in
3646 fact was obtained as the result of the Sidac violation of the contract.

You see the way the matter was handled by Mr. May which supports the statement I have just made in Exhibit 1018. In 1018 Mr. May sent a formal letter to Mr. Copeland, assistant treasurer of the parent company, duPont, referring to the basic agreement between duPont and Arena of June 9, 1923, as your Honor will observe in the first paragraph, and calling attention to the fact that that agreement had been amended as a result of the arrangements with La Cellophane to broaden duPont's sales territory. Here again we have a reference to how the information of La Cellophane came to Sidac. "Certain employees of La Cellophane," he says, "left their employ and engaged with others in the manufacture of cellophane in Belgium through what was known as the Sidac."

3647 Now, your Honor, I would like to talk about two very important exhibits. Exhibit 1022 is the first of the two which Mr. Tubridy read in which you find in one volume, and Exhibit 1414, which you find in still another volume. For a reason which I cannot understand, the Government chose to discuss Exhibit 1414, which is the report of the meeting attended by Mr. Swint and Mr. Pickard, with other European producers, after it had read Exhibit 1022, the clear implication being that after the cartel discussion found in Exhibit 1022, a firm agreement was made as recorded by Exhibit 1414. And yet if your Honor observes carefully, he will note that Exhibit 1022 is dated April 1, 1932,

and the official report, Exhibit 1414, is dated much earlier, February, 1930. So 1414 under no conceivable circumstance could have resulted or flowed from Exhibit 1022. The very interesting fact is, if the exhibits are put in their proper sequence, the one to the other, we find La Cellophane saying on April 1, 1932, months after the official report that is supposed to say we were members of the cartel as follows, "Owing to the fact that you preferred not to join the convention, we could not keep Wolff and Sidac away from your markets, i. e. the United States, Canada, et cetera, as they would not get anything in return, whereas ourselves would, of course, as in the past, refrain from selling in your territory."

So we have it on the Government's own exhibits when they
3648 are put in proper relationship to each other that La Cellophane itself says to us that we refused to join the cartel.

Then I call your Honor's attention to another significant fact, which was not mentioned by the Government. If you will look at the foot of the so-called official report, Exhibit 1414, you will find that the agreements there recited are attested by everyone present at the meeting except Mr. Swint and except Mr. Pickard, the only two representatives of duPont at the meeting. It seems clear when those two exhibits are read in their proper relationship, that Mr. Swint and Mr. Pickard sat in on the discussion, didn't agree, and that La Cellophane, as it says later in 1022, "* * *" preferred not to join the convention and that Wolff and Sidac could not be kept from the markets." Could there be clearer documentary evidence than that?

Then if your Honor will study the so-called official report, another interesting fact emerges. At the bottom of page 3 of Exhibit 1414, after a whole lot of talk about various arrangements among these foreign producers and quotas in markets, and arrangements as to price, their own agreement specifically says that those arrangements do not relate to the exports which the companies are going to make to North America. That is at the very bottom of page 3 to the top of page 4. And why? Because duPont didn't join this cabal, as Mr. May in a later exhibit refers to some fancy

European consortium. So we have it on these exhibits that
3649 duPont was not a member, and just to make the comedy complete we have in exhibits to come that the other fellows that thought they were couldn't hang together and the whole arrangement never amounted to very much. Different people broke the traces all the time. And duPont said, "We are going to pay no attention to it. We are going to sell."

Next I would like to take Exhibit 1023. This is just fifteen months after Mr. May went to Europe and negotiated for the ex-

pansion of duPont's territory. And it is the first of a group of increasingly strong and positive letters which Mr. Yerkes wrote telling The Comptoir that since they had not been able to perfect their arrangements about the South American market with their other licensees, we were going to go ahead. Questions of quota, questions of price were not for us. He says, "Considering all of the circumstances we must consider ourselves free to pursue our own policy of sales in South America, Japan and China L. A. Yerkes." Now, does that leave any doubt that having gotten the territory we were going to go forward and develop it ourselves? And that is what we did. And we seized upon the fact that in an earlier letter La Cellophane told us that one of its licensees couldn't be kept out of the United States, Sidac. It was part of their commitment in their original contract with us that they should; so we said, we're off. And we went ahead and sold it and pursued our own policy. And if the Government wants to put the other exhibits in that come along here, which are among
3650 those that it omitted, you will see that reiterated and strengthened and underlined and improved on.

Now, if I may skip across the notes for a moment, across the other exhibits, the contention that is being advanced here must be in the face of these facts that these were commercial arrangements rather than technical arrangements, and just to close this chapter, before dealing with the other exhibits, your Honor, may I ask that you turn to Government's Exhibit 1039.

Here in May, 1935—mind you, the French are still with us in the joint venture—duPont is discussing within its own confines, what are the rights of the French after December 1, 1935, and Mr. Jenney, the Assistant Director of the Foreign Relations Department, writes to Mr. Carpenter, Vice-President of duPont, and does he say, "We don't have to worry about the French coming over here; we have a cartel understanding and a division of markets so don't worry"? He does not. He turns explicitly to the contract, and properly to the technical contract, the agreement licensing secret processes and inventions between La Cellophane and the Du Pont Cellophane Company, and he says, "Under the technical agreement between Du Pont Cellophane and Societe La Cellophane, Du Pont Cellophane has an exclusive license to all of the French patents and technical information, and they * * *"
that means the French, "* * * have no rights to use our
3651 information * * *" that is, the information we licensed to the French exclusively abroad "* * * in this country." Therefore he says as a practical matter they are not coming over here.

3652 Now, I ask your Honor, is that letter of Mr. Jenney the letter of a man who has been conspiring in a fancy European consortium, or is it the letter of a man construing carefully the precise written contract that was in existence, the contract which we say was *the only contract that governed the relations* between these parties? I think it is clearly the latter.

Your Honor asked Mr. Tubridy what is the distinction of the technical agreement which is referred to. Well, the technical agreement which, your Honor will recall, was the agreement entered into by La Cellophane with Du Pont Cellophane Company which determined the rights of the parties in the secret processes and inventions, and Mr. Jenney referred to that because that was the only agreement after this date that governed La Cellophane's obligations with regard to the utilization of the technical information, and a copy of this went to Mr. May.

I think it is interesting, your Honor, to note that Exhibit 1041, Mr. Spargo's opinion, which Mr. Tubridy says that he as an anti-trust lawyer does not agree with, was written the next day. Mr. Jenney, the operating official concerned with the management of these agreements, is not parroting some fancy lawyer's argument. The lawyer's document is written subsequent to Mr. Jenney's document. I think with all respect to Mr. Tubridy that Mr.

3653 Spargo's analysis of the contract was correct. He distinguishes carefully between the right to use information and the right to participate in the business as a shareholder, and he says they have different status after December, 1935. They can't come over and use the information, but they can come over, as he says, and take an interest indirectly in the business if they wished.

The COURT. That would make a good law school examination question.

Mr. GESELL. Wouldn't it?

Mr. TUBRIDY. A perpetual license, yes, sir.

Mr. GESELL. I don't know what Mr. Tubridy means by "a perpetual license."

Mr. TUBRIDY. That is what that is.

Mr. GESELL. The date of this was in May, 1935.

The COURT. I was just interested in the Spargo interpretation. I thought it presented a legal problem and I still think it would make a good question on a bar examination.

Mr. GESELL. I think it would, and it is just the kind of question, your Honor, of that sort that they were engaged in themselves, as you will see in the last paragraph, because he says that there is no point of taking this up with the French unless something comes up about it, and all that was going to was an academic discussion between Mr. Spargo and others as to what the situation was.

3654 Mr. MINICUS. Are these still the two partners that didn't deal at arm's length?

The COURT. Wait a minute, gentlemen. Let us be a little more formal. This is not an open forum discussion.

I do think this is engendered, though, by your remarks concerning these exhibits, Mr. Gesell. You are really arguing the merits of these exhibits, and I think you sting the other side. See if you can just restrict your comments to what these show and what they do not show. I think these rhetorical questions you have been putting annoy the gentlemen of the Department of Justice.

Mr. GESELL. Well, I am more interested in whether it helps your Honor.

If I may for a moment here at the close make this observation, with all respect—and I think we are coming to it more next week—on our side we find it not very helpful to hear disjointed paragraphs read and no effort made to talk about the significance.

The COURT. I agree with you. It is helpful to get it.

Mr. GESELL. And I am trying to give you our notion of the significance.

The COURT. I think you have done very well for the first week, and I hope we have as nice a week next week.

You have to rush to catch your train so we will adjourn the trial until next Wednesday morning at 10:30.

3655 (At this point the trial was adjourned to Wednesday, January 24, 1951, at 10:30 o'clock a. m.)

* * * * * *

3659 WEDNESDAY, JANUARY 24, 1951, 10:30 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. We understand from Mr. Tubridy that he proposes next to discuss other documents in the section that we went through last week, and in view of the fact that I had practically finished my comments on Friday, I think I will defer any further comments until he has finished up with that section.

Mr. TUBRIDY. I would like to offer in evidence, your Honor, Government Exhibit No. 1008, which appears at page 1015 of Book No. 8.

Government's Exhibit 1008

(The letter from Mr. Pickard to Mr. Yerkes, dated November 19, 1929 was received in evidence and marked "Government's Exhibit No. 1008.")

Mr. TUBRIDY. This is a letter from vice-president Mr. Pickard to Mr. Yerkes, dated November 19, 1929, entitled "Sidac Competition," in which he states, "Since talking with you last week I have discussed this matter further with Mr.——

The COURT. Excuse me. What date did you say that was?

Mr. TUBRIDY. November 19, 1929, sir.

3660 "Since talking with you last week, I have discussed this matter further with Mr. Mudge, who, like ourselves, sees no possibility of doing anything along the line of the French proposals.

"Mr. Mudge, however, feels that the plan which I suggested to you, namely, payment for patents, manufacturing rights, processes, damage through past violation of patents, etc., in the form of non-voting common stock would be a thoroughly sound and legal transaction.

"I shall be glad to discuss this with you further in New York Friday morning if you are available then."

I offer in evidence Government Exhibit 1009, a letter from Mr. Ewing to Mr. Pickard, dated December 17, 1929, which was sent from London.

(The letter from Mr. Ewing to Mr. Pickard dated December 17, 1929, was received in evidence and marked "Government's Exhibit No. 1009.")

Mr. TUBRIDY. "Dear Mr. Pickard:

"Your letter of December 15th was received this morning, and we have sent off your cable as per the enclosed. We are mailing a confirmation copy to Mr. Yerkes and to Mr. Jenney as you requested.

"With kind regards to you and Mrs. Pickard, I am, Mr. Ewing."

Now, the enclosed telegram, your Honor, is rather illegi-

3661 ble, and with your Honor's permission I would like to give you a copy. It is dated the 17th of December, 1929, and states the code translation. The code is on the left hand side.

The COURT. Just for my own interest, what is this code here?

Mr. TUBRIDY. It is the code of the duPont people, I believe.

The COURT. It is just academic interest. Do you know, Mr. Gesell?

Mr. GESELL. I assume it is duPont's commercial code which it uses in order to save expense in cabling, as most companies do, I think.

The COURT. It looked like Russian, that is the only reason.

Mr. GESELL. I am sure the Government does not contend that.

Mr. TUBRIDY. (Reading.) "Yerkes SIDAC French deal not concluded but apparently near agreement provided American situation can be adjusted stop Compensation for American violation of Patent rights would come to us stop This could be arranged to eliminate difficulty of French holding indirect interest in SYLVANIA Company stop Our position carefully protected by Bernheim stop We owe it to our French Associates to consider the matter seriously and promptly stop Can you or your dele-

3662 gates meet us here about 14th January for conference provided SIDAC arranges to have Wallack present stop Control of SYLVANIA (Sylvania) in American hands which prevents direct action by Sidac stop Telegraph to Hotel Lotti Paris not later than Friday morning Pickard."

3663 The next Government exhibit is 1026, which I offer in evidence.

(Letter from Mr. Hess, Assistant Secretary of Du Pont Cellophane Company, Inc., to Mr. Adamson, dated July 12, 1932, was received in evidence and marked "Government's Exhibit No. 1026.")

Mr. TUBRIDY. This is a letter from Mr. Hess to Mr. Adamson, Secretary of Du Pont Cellophane Company, with copies to Mr. Copeland, Secretary of E. I. duPont de Nemours, and Mr. Mudge, Director of the Legal Department, dated July 12, 1932, titled "Foreign Cellophane Markets." It states:

"I believe you have attached to the agreement between the duPont Company and the Arena Trading Corporation, dated June 9, 1923 covering formation of the DuPont Cellophane Company, Inc., copy of Minute of the latter's Board meeting held on May 8, 1930, together with papers to show acceptance by our French Associates, La Cellophane, in connection with extension of our territory to reimburse us incidental to La Cellophane's indirect participation in Sylvania Industrial Corporation.

"It will probably be well to also attach to the above documents in the Secretary's File the following papers:—

1. Copy of Minute of DuPont Cellophane Company's Board meeting held on May 24, 1932;

2. Copy of the President's letter, dated June 2, 1932,

3664 to Comptoir des Textiles Artificiels (for account of La Cellophane);

3. Copy of Comptoir's reply, dated June 24, 1932; all of which are enclosed. Please acknowledge receipt on attached copy of this letter."

That is signed by Hess.

Your Honor, in case you want to have reference to any of these documents to which reference is made in the letter, I might be able to point out which Government exhibits these are.

The COURT. No. 1.

Mr. TUBRIDY. He speaks in the first paragraph of GX-1015.

Mr. GESELL. That is May 8, 1930.

Mr. TUBRIDY. No. 1, copy of minutes of Du Pont held on May 24, 1932—that is GX-1466. I don't believe that is in as yet but it will eventually be in.

The COURT. No. 2.

Mr. TUBRIDY. That is GX-1023. And the next is 1024.

I offer in evidence Government's Exhibit 1036, dated December 26, 1934, which is page 1068.

(Memorandum from B. M. May, dated December 26, 1934, was received in evidence and marked "Government's Exhibit No. 1036.")

Mr. TUBRIDY. This is a memorandum which is addressed
3665 to no one and reads as follows:

"What is written below is largely repetition but the urge to write it comes from a letter from Brandenberger. The letter contains a statement of their sales in South America and requests that we give him ours. I suppose the theory behind it is the same as it was when he wrote in the early part of 1934. Then he claimed that because we sold more material than La Cellophane in South America in 1933 (giving figures) we should allow them to ship 15,000 kilos to our distributors on the basis, I suppose, that one-half of the total business that duPont and La Cellophane do in South America is to be divided equally, regardless of quality, service, or the effort to obtain it.

"Going back to 1930, La Cellophane was in a 'mess'. Sylvania had started here. The French acknowledged some reparations were due us because of that occurrence. The attempt at reparations took the form of extending our territory beyond North and Central America, but that extension was based upon some fancy European 'consortium' that apparently never worked out. La Cellophane, on plain sheeting only, was to establish quotas among the Europeans for South America and whatever La Cellophane's quota was we were to have 50%. We never could ascertain how the quotas were determined and never did learn how the parties other than La Cellophane observed theirs. Neither did we
3666 ever hear whether any of them made compensations with each other for any quantities any party may have shipped in excess of his quota. Unless such compensations and adjustments were made (I doubt it very much) among all the European parties, upon what basis could we be expected to make adjustments with one of them? The whole thing was based upon an impracticable premise, and I thought so at the time. They were never able to get together over there."

The COURT. At that point, so I can keep the continuity, is this the stillborn cartel you were referring to last Friday, Mr. Gesell? You remember you made reference to the map and you said, "The point of the matter is it was never carried out." Is this what Mr. May is talking about?

Mr. GESELL. That is my understanding.

Mr. TUBRIDY. (Continuing.) "When we talk about 'equal rights' with La Cellophane, it is, among other things, assumed that

their rights with others can be maintained—otherwise what rights have we except to assert our own to solicit business in South America and to derive the benefits that come from a real sales effort free from a lot of impracticable European business politics? While they were 'negotiating' and talking about 'quotas' and doing other 'easy chair' things, we attempted to develop a market by real work, consisting of sending qualified salesmen using the very methods that were successful in this country. The
3667 result has been that our business is expanding because we did something about it and the reward is a claim upon us to divide.

"When it comes to 'moistureproof', the French made it clear that they were free of any 'arrangements' with other Europeans and, therefore, duPont's rights in South America would thenceforth be equal to La Cellophane's. La Cellophane 'pooh-poohed' moistureproof and apparently have never made any attempt to really promote and sell it. They had the same 'rights' in South America as we did but what did they do about exercising them except to lay claim to half of the total business done by them and us? I can imagine their reception of a claim from us had they done more business than we."

The COURT. Will you pause at that point. I want to make a note and then ask the question.

Explain this to me, Mr. Tubridy. Throughout this correspondence when they talk about a claim to the South American business, for example, does that mean that if one country went in and actually did the business in terms of dollars and cents, there would have to be a payment over to the country that was to share that business? How does that work?

Mr. TUBRIDY. That is what this dispute is about, sir. The argument goes back and forth. The French position with regard to this allotment of quotas is that each one is to do 50 per cent of the business in South America. If the other one did an excess
3668 of the 50 per cent of the business then the other one was entitled to the share for profits in that. So that they would both end up with 50 per cent net at the end of the business year, is the French position.

Our position is that that is what duPont agreed to do. They agreed to quotas in South America. These quotas were set up by this consortium. La Cellophane had rights in South America based upon these consortium arrangements. duPont was to get one-half of the French rights.

Now, what happens is that duPont sold more in South America than the French did. Now, the documents will indicate, we believe, that duPont agreed to this quota business. Then after it didn't work out, duPont said, "We don't like this business of

quotas." In other words, they entered into the agreement. They agreed to do it and after it had been going on a couple of years and wasn't work out the way they wanted to do, it went and reviewed the situatjon and said, well, what did we agree to? We're not going along with this business of quotas. Let's go in like hard fighting business men and get our share of the market—and then in 1932 and 1934 transkated the understanding to mean that they had never agreed to quotas—only an equal share of business—so we have a situation where they made an agrement and then for one reason or another didn't keep it.

The COURT. All right, proceed.

Mr. TUBRIDY. Continuing:

3669 "I would take the position that on plain material we regard South America as an open market. On moistureproof, that we are going to rely upon our patent position and assert the same against all but La Cellophane, the latter being free to exercise its co-equal right of competing with us. In the event of any manufacturing in South America, either plain or moistureproof, our rights and La Cellophane's are the same, but neither can do anything on manufacture without consulting the other."

3670 I would like to offer in evidence Government Exhibit No. 1019, appearing at page 1035.

(The telegram dated July 12, 1930, from May to Swint was received in evidence and marked "Government's Exhibit No. 1019.")

Mr. TUBRIDY. It is a telegram from May to Swint dated July 12, 1930, and is as follows:

"SWINT

"DU PONT

"LONDONG

"BERNHEIM WRITES HE EXPECTS TO SEE YOU IN PARIS ABOUT THE SIXTEENTH stop PLEASE OBTAIN FROM HIM ALL POSSIBLE INFORMATION REGARDING CELLOPHANE stop I HAVE ENDEAVORED TO KEEP YOU INFORMED BY SENDING COPIES ALL CORRESPONDENCE stop WE HAVE MADE NO ACTUAL ATTEMPT EXPLOIT OUR CONCESSIONS IN JAPAN AND SOUTH AMERICA PENDING RECEIPT OF QUOTA FIGURES stop WE ARE ALSO UP AGAINST THEIR REGISTRATION OF THE TRADEMARK LACELLOPHANE IN THOSE COUNTRIES stop THIS LATTER FOR YOUR INFORMATION ONLY Stop DO NOT DISCLOSE TO HIM THAT WE ARE PUZZLED ON THAT POINT Stop FEEL HIM OUT ON A TENTATIVE PROPOSITION THAT DU PONT HAVES ALL SALES IN SOUTH AMERICA AND LACELLOPHANE ALL IN JA-

PAN OR VICE VERSA Stop SUCH A PLAN WOULD OBVIATE TRADEMARK COMPLICATIONS AS WELL AS OTHER PRACTICAL DIFFICULTIES IN MARKETING THEIR PRODUCT AND OURS THROUGH COMMON CHANNELS A PROPOSITION HE HAS
3671 ALREADY SUGGESTED Stop DISCUSS WITH HIM ALSO VISCO CHEMICAL COMPANY MY LETTER JUNE TWENTY-THIRD Stop DELIGHTED YOUR NEW APPOINTMENT AND EXTEND CONGRATULATIONS

"MAY"

I would like to call your Honor's attention to the fact that duPont did not start—stated they were not going to start to sell in South America until they had received the quota figures. What does that mean? They could not start working until they had been told what they were supposed to sell down there, what they were to be allowed to sell.

I would like to offer in evidence Government Exhibit 1020, which appears at page 1036.

(The letter dated July 23, 1930 from Homer H. Ewing to Mr. B. M. May was received in evidence and marked "Government's Exhibit No. 1020.")

Mr. TUBRIDY. This is a letter from Mr. Ewing to Mr. May dated July 23, 1930, from London.

"We received your telegram of July 12th and Mr. Swint and I spoke with Mr. Rene Bernheim on July 16th, returning on the morning of the 17th to witness a demonstration of the cellophane film:

"Negotiations have been continued with S. I. D. A. C., Transparit and Kalle & Company, the last matter taking place early in July in Brussels. As Mr. Bernheim explains, however, the
3672 weather was very warm and was not conducive to quick results. In principle all the parties are in agreement but final figures have not been reached. It may be necessary to have the Swiss bankers lay down the final figures, and, in fact, this suggestion was put forward at the meeting.

"We explained to Mr. Bernheim that until now no attempt has been made to exploit our concessions in Japan and South America, and Mr. Swint also put forward the suggestion that Comptoir take either South America or Japan, leaving the other country for duPont. He thought well of the proposition and suggested that duPont take Japan and leave South America for exploitation by Comptoir. Although he said that Comptoir had not investigated the Japanese market it was his distinct impression that it was a profitable market in view of the fact that the Japanese were replacing the oil-paper windows with cellophane, and

because of our waterproof product, which they did not manufacture, we would be in a position to offer waterproof cellophane for glazing Japanese houses. Mr. Bernheim jumped at this suggestion rather quickly which may cause you to want to examine the Japanese market before you agree to take this vis-a-vis South America.

"Mr. Bernheim also agrees that in the event that we do operate jointly in either South America or Japan we should not have two agents competing but should have one agent for both parties, the agent selling both products—'La Cellophane' and 'duPont
3673 Cellophane'. If the plan as suggested, however, meets with approval all round then the trademark complication would not come into question."

I think we can skip the next four paragraphs, sir. It is in relation to another matter. I will finish quoting this paragraph from the exhibit, the last full paragraph on the second page:

"While speaking about the waterproofing process Mr. Bernheim suggested that you will no doubt want to 'show your teeth' to Wolff and S. I. D. A. C., who are doubtless infringing the duPont cellophane waterproofing patent. Mr. Swint has made a note of this and will probably discuss it with you directly."

I offer in evidence Government's Exhibit No. 1112, appearing at page 1248.

(The letter from Mr. Yerkes to Mr. Bernheim dated January 26, 1932, was received in evidence and marked "Government's Exhibit No. 1112.")

"DEAR MR. BERNHEIM: I have your letter of January 7th containing various items of news regarding Cellophane.

"I note that you are having difficulty with Wolff & Company. I trust you will be good enough to let us know when this matter if finally settled one way or the other.

"As we have already written you, we have made our prices
3674 in South America on plain Cellophane to correspond with yours, but frankly, as this price is higher than our price in the United States, and as it is also higher than other quotations we have heard of in South America, we have considerable doubt as to whether it will last. The latest report indicates there is Italian Cellophane going into South America at cut prices.

"It is also pretty clear that some of the big accounts in South America will simply buy their Cellophane through their own offices in New York or through other agencies in New York and transport it to South America themselves at lower prices than we are quoting, all of which is quite inconsistent.

"The differential on the Moistureproof Cellophane is, according to our opinion, out of line. You were to let us know about this but we have not heard any news.

"In regard to the quantities we have sold in South America during the past year, we will have these figures accumulated shortly and will forward them to you. In the meantime we shall be very glad to have your figures, as well as those of the others.

"Incidentally, we have never received from you the official figures of your sales and all the other participants, on which the present sales are supposed to be based.

"We are naturally interested in your negotiation with
3675 Courtaulds for a possible English plant. From our point of view it would be a very happy solution, with the proviso which you have insisted on in accordance with our contract, that Courtaulds shall not use information obtained from you for a possible English plant to build a similar plant in the United States or Canada. In other words, that Courtaulds shall be excluded from this country and Canada. I would appreciate being kept advised as to how this matter continues.

"With kindest regards, I am

"Yours very truly."

The COURT. That last company refered to is a new one.

Mr. TUBRIDY. We will come to that later on, sir. I read that here. I should have put a flag on it, I suppose, because it comes up. Courtaulds is the company that was responsible for British cellophane, and then actually what did happen and did transpire, British cellophane was developed and worked out, but only sold in the British empire, and they did keep out of the United States and Canada.

I offer in evidence Government Exhibit No. 1024, which appears at page 1046.

(The letter from Bernheim to Yerkes, dated June 24, 1932, was received in evidence and marked "Government's Exhibit No. 1024.")

Mr. TUBRIDY. It is dated June 24, 1932, from Mr. Bernheim to Mr. Yerkes:

3676 "We have duly received your letter of June 2nd and we have taken knowledge of the letter written by Bezons to Mr. Hatt to which you refer yourself.

"Evidently the situation of The Cellophane in the Cellophane-Sidac and Transparit Agreement is not favorable at all and we will hold you posted from time to time of what is going on.

"With regards China, there is evidently a mistake on your side. No one here could possibly give you any right to China as this market was already disposed of and everyone on our side knew it very exactly. We do not see how this misunderstanding occurred but we ask you to kindly give immediately all instructions to avoid that our product is offered on the Chinese markets as it would

complicate matters considerably with all and especially with Kalle & Co. and the I. G. group.

"With regards South America and Japan the understanding was that we would share these markets. We understand that is for ordinary Cellophane as well as for moistureproof Cellophane and we will hold ourselves at your disposal to make a proper sale arrangement so as to work out this arrangement in the proper practical way.

"Yours very truly,

"(S) RENÉ BERNHEIM."

3677 I offer in evidence Government's Exhibit 1025, appearing at page 1047, which is similar to 1024, sir, except that Mr. Yerkes transmits this information to Mr. Carpenter in the form of a copy of the letter which is set out in Exhibit 1024.

Mr. GESELL. Now, your Honor, I haven't been pressing these objections as we went along because they were all reserved, but here is just a duplicate of the prior exhibit except that it is addressed to a different person, and we have an objection that this kind of thing is cumulative, and I wonder if we might have from the Government some statement as to the particular significance of this document, so that when we deal later on with the objections we will know why it was offered.

Mr. TUBRIDY. I will explain it to you, sir, very simply. 1024 was objected to on the ground that it was hearsay, and 1025 was objected to on the ground it was cumulative. So we withdrew 1025. We had 1024 standing with the objection of hearsay to it.

The COURT. You mean the pre-trial objections?

Mr. TUBRIDY. Yes.

The COURT. Proceed.

(Letter to Mr. W. E. Carpenter, Jr., dated July 6, 1932, was received in evidence and marked "Government's Exhibit No. 1025.")

3678 Mr. TUBRIDY. I offer in evidence Government's Exhibit 1030, appearing at page 1055, which is a letter from Mr. Hatt to Mr. Hess, dated March 23, 1934.

(Letter from Mr. Hatt to Mr. Hess dated March 23, 1934, was received in evidence and marked "Government's Exhibit No. 1030.")

Mr. TUBRIDY. It reads as follows:

"SALES IN SOUTH AMERICAN & JAPAN:

"Enclosed herewith is copy of letter dated March 10th from La Cellophane, summarizing the total sales by themselves and ourselves in South America and Japan for the three-year period of 1931, 1932, and 1933.

"They brought this to our attention with the thought that inasmuch as we have sold more material in this territory than they have during the past three years, we should arrange to draw on their stock for a quantity that will equalize this difference which they calculate to be 15,319 kilos or 33,700 pounds.

"They do not specify in what period of time they would expect us to give them this additional tonnage, and on account of the size of the quantity it would, obviously, not be possible to give all of it to them in any one year for the reason that it would represent too large a percentage of our total shipments into that territory.

"My own thought is that our agreement was that we
3679 were to have equal rights there and we might interpret this to mean that we had equal opportunity to sell what either of us could. This obviously is not their analysis of the situation and we shall have to make some sort of reply to this proposal.

"We can take the position we have made no money in net profit as yet on this trade and that we are, ourselves, out of pocket on the transactions in these territories, when we eliminate the principal export volume which is to the Philippines, Cuba and Mexico which are not involved with them—or, we might perhaps, offer to pay them a few cents per pound as an estimated net to be attained in the future on this business.

"I am submitting it in this form, however, for the executives' attention and consideration and for their comments as to the attitude we should maintain before making a reply to this letter.

"The executives will undoubtedly recall that at the time it was determined to send a representative into South America, a possibility of this kind was discussed and at that time it was agreed among ourselves we would attempt to settle this issue in some fashion to be determined later if and when it should arise.

"Comment, with suggestions, will be appreciated."

Mr. GESELL. You are not going to read the comments?

3680 Mr. TUBRIDY. I will be happy to read them.

Mr. GESELL. I think as long as the record shows there are marginal comments, your Honor, I can read them when my turn comes.

* * * * *

3690 Mr. TUBRIDY. I offer in evidence Government's Exhibit No. 1466, which is a copy of the minutes of the Board of Directors of Du Pont Cellophane Company, Inc., of a meeting held May 24, 1932. This exhibit appears at page 6026 in book No. 36.

(The copy of the minutes of the Board of Directors of Du Pont Cellophane Company, Inc., of meeting held May 24, 1932, was received in evidence and marked "Government's Exhibit No. 1466.")

Mr. TUBRIDY. We can skip down, your Honor, to the last paragraph on the first page, where it says:

"FOREIGN CELLOPHANE MARKETS:

"Reference was made to action of this Board on May 8, 1930, and to letter of April 1, 1932 from La Cellophane (and the map which accompanied it), in which letter the
3691 statement was made that Wolff and SIDAC are free to enter the United States, Canada, etc. and that duPont has no rights in China. All of the foregoing refers to 'plain' or 'regular' Cellophane as distinguished from 'Moistureproof.'

"It was brought out that in agreeing in May 1930 to La Cellophane's taking participation in SIDAC, the latter would confine its activities in North America to its interest in the Sylvania Industrial Corporation, and that in the event Wolff joined a European Convention then being formed, duPont would be accorded equal rights with La Cellophane in China. La Cellophane also agreed to our having equal rights with them in South America and Japan.

"With reference to 'Moistureproof' Cellophane, a product patented by DuPont, the latter was to have equal rights with La Cellophane in South America and Japan.

"A review of the developments since 1930 indicates that duPont has not received the full benefits of settlement agreed upon, and finds it impracticable to conduct its business in South America and Japan with the restrictions attempted to be imposed. Under the circumstances, it was unanimously agreed that duPont should feel free to pursue its own policy of sales in South America, Japan and China, and that appropriate letter should be addressed to La Cellophane apprising them of our intentions in this respect."

The COURT. There is a new name that appears for
3692 the first time. Who is Mr. Paskus?

Mr. TUBRIDY. Mr. Paskus, sir? He is an attorney who was in the early negotiations and drawing of the contracts between La Cellophane and the duPont people.

Mr. GESELL. He is one of the directors, your Honor, of the company.

The COURT. Yes, I notice he was absent, and I just wondered who he was.

Mr. GESELL. He was a French director.

Mr. TUBRIDY. The Government offers in evidence Government Exhibit No. 1467, appearing at page 6028.

(The letter from La Cellophane to Mr. G. H. Andrews, dated June 7, 1932, was received in evidence and marked "Government's Exhibit No. 1467.")

Mr. TUBRIDY. This is a letter from La Cellophane to Mr. Andrews, the export manager of Du Pont Cellophane Company:

"DEAR SIRS: Referring to the last paragraph of our letter"——

Mr. GESELL. I think we ought to have the date, if your Honor please.

Mr. TUBRIDY. I am sorry.

The COURT. Yes.

Mr. TUBRIDY. It is dated June 7, 1932.

3693 "Referring to the last paragraph of our letter of the 1st of April, by which we requested you to let us have your selling figures in South America and Japan, we are sorry that these have not yet come to hand. As a matter of fact we are only waiting for your figures in order to close the accounts with our Convention partners. As you will remember, we are obliged to comprise your figures in our share.

"Please give us all necessary details by return of mail; otherwise we will be quite at a loss in finding arguments to give to our partners as an explanation of our keeping them waiting."

The Government offers in evidence Exhibit 1468, appearing at 6029.

(The letter from La Cellophane to Mr. G. H. Andrews, dated November 22, 1932, was received in evidence and marked "Government's Exhibit No. 1468.")

Mr. TUBRIDY. This is a letter from La Cellophane to Mr. Andrews dated November 22, 1932:

"In order to keep to the rules of our Convention, we shall be obliged to you for supplying us with the weight of film you have effectively sold in the different countries of South America and Japan in which we share the business. Four figures should be given, i. e., one for regular and one for Moistureproof film, for South America on one side and for Japan on the other, and this from the 1st of January this year up to the latest figures available.

3694 "We would further be glad if you would in future let us have these figures monthly.

"Thanking you in anticipation, we remain, dear sir,

"Yours truly."

* * * * *

3695 The Government offers in evidence Exhibit 1476, appearing at page 6038.

Government's Exhibit 1476.

(The letter from Mr. Yerkes to Mr. Bernheim dated December 15, 1932, was received in evidence and marked "Government's Exhibit No. 1476.")

Mr. TURKIDY. This is a letter from Mr. Yerkes to Mr. Bernheim, dated December 15, 1932:

"I don't know how close you have been keeping in touch with the Cellophane export situation, but I feel that the time has come when we must write to you frankly. The matter is about as unsatisfactory from our point of view as it could possibly be and is getting more muddled and more unsatisfactory all the time. I know you will understand that I feel that the time has come for me to speak frankly about this matter.

"In the first place, we must insist that we are not governed in any way by your convention, nor subject to its rules and regulations. We have tried to cooperate but we have not been successful, largely we believe because you have never been com-
3696 pletely frank with us about your situation in Europe.

"To go back to the beginning, you have never sent us the Convention figures or any definite data regarding your export situation. All we have gotten from time to time has been a message saying that our quota was so and so, and so and so. To put the matter very frankly, we think that we have tried to, what we call over here, 'play the game', but have received little or no real cooperation from your side, and we cannot go on any longer.

"The latest letter from Mr. Meyer, dated November 22nd, asks us for figures which, frankly, we do not propose to furnish for Moistureproof as Moistureproof is entirely out of any even tentative agreements which we may have; and inasmuch as we have never had any figures from you or any members of the Convention or regular, we do not propose to furnish these.

"If and when you furnish us with exact tabulations, certified, from each member of the convention, of all export figures monthly, we shall in turn send you ours.

"You will notice Mr. Meyer's letter of the 22nd reads more like an order than anything else and nothing is said regarding our situation at all; simply what you want. I must say we rather resent this attitude. I also am going to tell you that this has been the attitude for the last couple of years.

3697 "I think this situation is quite clear and I hope you won't misinterpret this letter. I think it can be recapitulated very concisely:

"First—We agreed to certain sales of regular Cellophane for the export trade in South America and Japan, based on certain percentages of your Convention. Absolutely no figures have ever been furnished us of sales of your company or of other members of the convention; we have simply received advice from you that our quota was so and so. We will not continue on this basis.

"Second—As to Moistureproof, there was to be no extension of the territory of your associates and no convention with your competitors in regard to it. It was to be exploited solely by Du Pont

and La Cellophane in South America and Japan. Your competitors had no Moistureproof product, so it was unnecessary to consider them in connection with it.

"It has been apparent to us for some time that in reckoning your quotas with your competitors you have included in your calculations the Moistureproof as well as the regular. This we did not and will not agree to.

"We reaffirm the position stated in our letter of June 2nd, 1932, a copy of which is attached. We will not, as stated in that letter, make offerings in the Chinese market.

3698 "I am sending a copy of this letter to Mr. Meyer, as it really is in reply to his letter to our Mr. G. H. Andrews, dated November 22nd.

"With kindest regards, I am

"Yours very truly."

Unless your Honor has some questions that you would like to address to me, that will conclude this group, and Mr. Gesell can make his comments thereto.

The COURT. I have none.

Mr. GESELL. Does your Honor want to take a midmorning recess?

The COURT. Yes; a 10-minute recess.

(At this point a brief recess was taken.)

3699 Mr. GESELL. If your Honor please, this group of documents is concerned with events which took place in approximately a period of four years.

The COURT. From when?

Mr. GESELL. From May 8, 1930, until the latter part of 1934, and they are all concerned with a single problem, that is, the operation of the agreement which Du Pont Cellophane reached on May 8, 1930, extending its territory into South America and elsewhere as a result of the Sidac controversy which we have already taken up with the Court.

Inasmuch as the Government in its presentation has jumped from '34 to '32 and then back to '30 and has not followed a chronological sequence, I thought that the best thing I could do would be to take the main exhibits in their chronological order and, without reading them, briefly develop for the Court precisely what happened as to this transaction in this period.

We start out with Exhibit 1015, which was read the other day, which is the basic agreement made with respect to the South American market in settling the Sidac controversy. That is at page 1031.

The COURT. That was Government Exhibit what?

Mr. GESELL. That was Government Exhibit 1015, at page 1031. And that provided, as your Honor will recall, among other

3700 things that Du Pont and La Cellophane should have equal rights in the South American market.

Now, the next exhibit which comes along in the sequence is Government's Exhibit 1019, the telegram which was read today, dated July 12, 1930, from Mr. May to Mr. Swint, and the comment made on this telegram was that it showed that Du Pont was not selling in South America pending receipt of quota figures from La Cellophane. When you see it in sequence, you will see that the agreement was ratified in May, and that this document is written at the very beginning of the chronology. It is true that sales, as this showed, had not been made in South America in the first two months after that market was opened up. But I emphasize that it is in the first two months.

I guess I should point out also that the suggestion in this telegram that possibly South America could be swapped for Japan, or anything of that sort, never was done. We stood by the basic agreement.

The next document then in sequence is 1020, on page 1036, dated July 1930. You see why the so-called quota figures had not come over, because in this letter the statement is made that the negotiations are still continuing over in Europe among Sidac, Transparit, Kalle, and the others, with reference to the matters discussed at the time Mr. May was over there, and that the warm weather had prevented quick results. Thus it is clear right at the

3701 beginning, in July following the agreement made in May of the same year, that the foreign group is having difficulty getting together.

Then the next exhibit is 1112 at page 1248, and there Mr. Yerkes begins to indicate his impatience with the way the arrangement is working out. He says that he hasn't been able to get any information from them and that he feels that it is going to be impossible to observe any kind of price arrangements, and they don't have any figures, thus indicating that the agreement is being implemented and giving some indication of why it was not.

Then in 1466, which is the next one in the sequence, at page 6026, we have the resolution of a Board meeting in May, 1932, only five months after Mr. Yerkes' letter, 1112, in which the Board takes the position that they have got to throw the whole thing over.

The COURT. That is Du Pont Cellophane Board?

Mr. GESELL. That is Du Pont Cellophane Board.

That meetings in May, 1932, and immediately following that, June, 1932, June 2, Mr. Yerkes writes, Government's Exhibit 1023, in which he reviews what has happened and the fact that nothing has been going on, and he says, "Considering all of the circumstances we must consider ourselves free to pursue our own policy of sales in South America, Japan and China."

3702 So we have a letter from Mr. Yerkes within fifteen months after the initial agreement that we talked about first, Government's Exhibit 1015, saying that we are going to pursue our own policy. That means our own prices, and that means our own amounts of goods that we are going to sell. It hasn't worked. The foreigners haven't been able to get together. Other practical difficulties have arisen that are recited in the letters, and Mr. Yerkes says, "We are going to pursue our own policy," and he says "You are going to see that we have taken this position when you see the resolution of our Board of Directors," which is Exhibit 1466 that I referred to a moment ago.

Then comes a great deal of correspondence backing and filling between the French and Du Pont Cellophane in which the French simply refuse to accept the position of independence that Du Pont has taken, and Du Pont refuses to retreat from the position of independence that it has taken.

Now, the first of the letters, you will recall, was Government's Exhibit 1467, which is the next in the sequence, and I asked Mr. Tubridy to read the date, which was June 7, 1932, and here is a request from someone in La Cellophane for quota figures. And you can see that it crossed Mr. Yerkes' earlier letter advising the Frenchmen of the Board meeting and saying, "We are going to follow an independent policy." So that request was mailed from that side at the time Du Pont Cellophane took the position
3703 which I have been discussing in 1023.

Then the next one is from Mr. Bernheim, and this is interesting in the sequence. It is No. 1024 and is a reply to Mr. Yerkes' letter of June 2. It is dated June 24, 1932. Mr. Bernheim seeks to ignore the letter. He indicates in the second paragraph that the efforts to form some kind of a European agreement are not going favorably, and then he goes right ahead and insists, in spite of Mr. Yerkes' letter, he would like to have some information so they can make some kind of a sales arrangement in South America.

There is another thing that I should point out about the letter. He reneges on China, which was part of the May agreement, and he says, "We don't see how you could have thought that China was one of the territories which was allotted to you in connection with the extension of your rights," and your Honor will see from 1013 that China was one of the territories and that this is simply a polite backing out by the French.

The next Government exhibit is 1468. That is written in November, 1932, and it is written by the Commercial Director, again asking for figures. And Mr. May says, "I wouldn't give him the figures on moistureproof in 1469" and then comes the reply in 1476, in which we again say to Mr. Bernheim, "You don't

seem to understand. You must not be keeping in touch
3704 with this export situation. We are simply not going to go along with the arrangements as to quotas and prices, and I refer you again to the fact that I said in my letter of June 2 that we were going to follow an independent policy."

The next one, in March, 1934, is the one that contained the figures that your Honor was interested in. It is Exhibit 1031, and that shows on its face that no quota had been observed, because when you look at the figures you see that throughout the entire period from January 31 right up until that time, Du Pont had sold an amount in excess of the French and had not observed any quota arrangement. And the French come back and say, "But look here, you are supposed to recognize that we have equal rights, or a 50 per cent position, or however you will," and that was why I insisted that the next in the sequence go in, which has now been marked 1031-A, because when the French come in and say to us, "Look here, you have a quota agreement," we go right back at them and say, "Won't you look at your correspondence? We told you on the 2nd of June that we were going to follow an independent policy," and we refer to the earlier correspondence. So we don't go along with any notion of quotas. We don't make any payment or any adjustment of it, and we continue to sell. I think it is worth pointing out at the bottom of 1031, your Honor, the reference to the separate selling organizations " the French
and Du Pont Cellophane because there have been other
3705 documents here suggesting that there were sales through common selling agents. There never were. And 1031 shows that the sales were made through separate sellinig agents.

The next episode is in 1934 with Exhibit 1035, and the French there indicate right on the face of that exhibit, in a letter to Mr. Hatt that nothing has been done to recognize their earlier claim to a quota, and they now don't even have figures to enable them to say what their present claims should be, but they are still doggedly pressing a claim. The document shows they are not even getting the figures and that nothing has been done to straighten out the arrangement, the rights that they say they are entitled to, emphasizing that we have stuck by the position taken by Mr. Yerkes in his letter of June.

Then comes one of these memoranda of Mr. May, 1936, written right after this letter from Brandenberger, which he refers to in the very first paragraph of the memorandum. And since Mr. Tubridy read it in full, I won't do that, but he points out that the whole idea back in 1930, when he made this arrangement, was based on some kind of a fancy European consortium that never worked out, that they were never able to get together over there, that Du Pont could never learn how the quotas were

determined, that there never was any compensation back and forth, and that Du Pont has gone ahead and sold and been
3706 selling, and he recommends that that is what they continue to do.

The COURT. Mr. Gesell, you are familiar with the exhibits that the Government intends to rely on and therefore I ask you this question just for a point of information.

Mr. GESELL. Yes.

The COURT. We are dealing here with an international cartel insofar as this period is concerned between the year 1930 and 1934. Are there in existence in the form of Government's proposed exhibits any documents other than these which you are now speaking of which showed the parties got together, had meetings, discussed these things in further detail, or is this the outline and is this the story as shown by these documents?

Mr. GESELL. I believe these documents are the story——

The COURT. For that period?

Mr. GESELL. As to South America. There are other documents coming in with respect to license arrangements and with respect to other countries in Europe and elsewhere, but I believe in the main these are the documents as to South America and it is just that episode that I am trying to cover here.

The COURT. Well, to use the colloquialism, I just wanted to know if this was the pattern of documentary proof or whether I was to have more fill-in as to South America for this period '30 to '34.

3707 Mr. GESELL. The next one in the sequence is December, 1934. This is 1037, a letter in which Mr. Yerkes writes to Mr. Brandenberger, refers to the June letter, refers to the March letter, and which emphasizes the action of the Board of Directors, to which I have referred, and says, "We want to make our position again absolutely clear," the position of independence.

So that with respect to the solution that was worked out of this Sidac controversy, what in fact happened was that duPont got rights to sell in South America, and it sold in competition with La Cellophane and La Cellophane's associates. It did not join any fancy European consortium, and it got in payment of the violation of its contract rights by Sidac the right to sell in border markets.

I have only one other comment which relates to a document which was discussed that is not in this sequence, as I understand it, at all, and that is Government's Exhibit No. 1005, at page 1015. I am not clear what the significance of that is from the Government's point of view. It is a letter from Mr. Pickard to Mr. Yerkes which he says that he has talked to Mr. Mudge and that Mr. Mudge says that it would be all right to take non-voting com-

mon stock in Sylvania as a means of being compensated for the Sidac situation. That suggestion, your Honor, of the possibility
of taking stock, was one of the suggestions that was made
3708 in the course of the negotiations, as Exhibit 1007 shows,
which your Honor may want to mark on 1008, and there are other documents that the Government has not yet come to that refer to the fact that one of the suggestions made at this time was that instead of getting broader territory it should be settled by duPont taking stock in Sylvania. Mr. Mudge, the company's general counsel, said it would be all right to take non-voting stock. In point of fact, no stock was even taken and the suggestion that stock be used as a basis for compensation went down the drain just like the suggestion that there be a money adjustment, and the real way that it was adjusted was the way that Mr. Yerkes insisted upon, which was that the territory be expanded.

The COURT. Will counsel come to a side bar conference?

(There was a discussion at side bar.)

Mr. TURRIDY. Your Honor, we are now on the second half of book No. 8. Beginning at page 1084 is an index or outline of what we consider of the exhibits which display the titles and subtitles set forth on page 1084.

These exhibits, except for one or two, your Honor, merely display the agreement in operation, the information that was transferred back and forth from duPont to La Cellophane and La Cellophane to duPont, and outside of the actual transmittal of the
letters, except for the documents which we will point out to
3709 you, just a few documents, outside of them, the documents
are merely licensing agreements, showing that the operation was put into effect and that the patents were sent back and forth between the countries and other types of information.

I would like to offer in evidence Government's Exhibit No. 1045, and since that is rather illegible, may I offer this to your Honor so that you may be able to follow it. It appears at page 1085 of book No. 8.

(The letter from Mr. Bernheim to Mr. Yerkes dated July 11, 1927, was received in evidence and marked "Government's Exhibit No. 1045.")

Mr. TURRIDY. This is a letter from Mr. Bernheim to Mr. Yerkes, dated the 11th of July, 1927:

"DEAR MR. YERKES: I acknowledge receipt of your lines of June the 27th, regarding Transparit and Waterproof Cellophane. Increased duty.—No. 1#—We are glad to hear that you hope to get a protection of 40¢ a pound, from 25% which it is now.

"If you agree I can let Transparit people know that you would be willing to sell for their account on a commission basis, 10% of your personal sales, these 10% being calculated on ordinary

Cellophane for wrapping purposes, excluding waterproof Cellophane, or Cellophane for photographic or cinematographic purposes.

"Transparit would take the risk of increased duty
3710 leaving you with no risk. I personally would prefer such a solution than Transparit starting a plant in the U. S. A. I am rather afraid that the temptation to work on a different process than the Transparit process would be too big for these people.

"With reference to the selling prices in Germany, you say that the Anti-dumping Law states clearly that foreigners must not sell in the United States at a less price, or return, to them than they have in their own country, etc. This is the very point which the I. G. people have discussed. They claim that, if they can prove that the return of sales made at a lower price in U. S. A. than in Germany gives the same return than their sales in Germany, the difference being in the lesser selling expense of the big quantities in U. S. A., they do not fall under the Anti-dumping Law."

The COURT. Whose laws are they?

Mr. TUBRIDY. The Transparit people is Wolff & Company, sir.

The COURT. I don't know what Anti-dumping laws are.

Mr. TUBRIDY. It is not particularly pertinent.

The COURT. Well, I just wanted to know. It is the concern of these Europeans, and I wondered what law it is. I don't know as a Federal Judge what an Anti-dumping law is. Maybe you can help me.

Mr. GESELL. May I interpose to say that there is
3711 an American anti-dumping statute that prevents importation of goods at sacrifice prices. The prices must bear a direct relation to the domestic price plus transportation.

The COURT. Was it part of our tariff statutes?

Mr. GESELL. It was then.

The COURT. How did it work in operation?

Mr. GESELL. I understand, the way that statute worked it is this: a foreigner could not sell into this country at a price lower than his domestic prices plus transportation and duty.

The COURT. What concern does that have here? Does it have any relevancy?

Mr. TUBRIDY. Except, your Honor, this is supposed to be a licensing agreement—the law itself has no particular relevancy.

The COURT. I see.

Mr. TUBRIDY. But here is La Cellophane discussing—the intermediary between Kalle & Company telling duPont people what

competitors in Germany are thinking and what they are going to do, and that does not come under any licensing agreement.

The COURT. I see.

Mr. TURRIDY. They are advising what policy to follow; they are gathering information for them what other competitors are going to do and transmitting it to duPont with regard to
3712 the cellophane industry.

I think we can skip all of the rest of the letter, your Honor, down to the last paragraph, paragraph VIII:

"The Belgium situation is certainly serious but they have no sale organization except Birn and Wachenheim; should your market be closed by increased duty the Belgium Co. would be badly off. That is what we are hoping.

"With kindest regards,

"Yours very sincerely,

"RENE BERNHEIM."

* * * * *

3741 Mr. TURRIDY. Those last three papers indicate the fact that they couldn't ship into the United States unless they got duPont's permission.

That is all I have in connection with that group, your Honor.

Mr. GESELL. First as to the exports, your Honor, in Government's Exhibit 1061, you will note on the first page that substantial exports to a large number of countries which during the time the agreements were in effect with La Cellophane were not countries to which duPont was free to export. They are on that first cover sheet, Angola, Bermuda, British Guiana, Canary Islands, China, Curacao, Dutch Guiana, Egypt, Iceland, Jamaica, Java, Liberia, Martinique, Morocco, Palestine, Portugal, Portu-
3742 gal East Africa, Surinam, South Africa, Trinidad, and Virgin Islands.

In the main, the shipments to those markets which were markets from which duPont was excluded under its license agreement, and excluded also for a portion of this time by its joint venture arrangements, took place after 1940—in other words, during the last ten or eleven years, and you will see the growth of those exports following the cancellation of the agreements with the French which took place in October, 1940, as a result of the war conditions that developed at that time.

Of course, if you carry the picture through on Exhibit 399, which takes in this full eleven-year period—at least up through 1949—you will see a much larger group of countries, which used to be in the French area, and the area of its other licensees to which duPont has been exporting in recent years.

On page 5570, which deals with moistureproof, you have a very long list of countries to which substantial exports are being made,

that fall in that category, Belgium, Bermuda, British Guiana, China, England, Ethiopia, France, Germany, Greece, Iran, Iraq, Italy, Jamaica, Java, Luxemburg, Martinique, Palestine, Portugal, Portugal East Africa, Surinam, Sumatra, Switzerland, Trinidad, Union of South Africa, and so forth—very substantial exports in some cases, small exports in others. Of course during the whole period, as the proof goes along, it will show that
3743 cellophane was in short supply and to some extent controlled by Lend Lease and other requirements, and duPont was mainly concerned with supplying the markets that it had established before the war.

Now, on the import statistics we take very sharp issue with the loose kind of generalization that was presented to your Honor concerning those statistics——

The COURT. That is 182?

Mr. GESELL. That is 181 and 182.

Mr. TUERDY. Excuse me. 182 was the only one that went into evidence.

Mr. GESELL. Well then, we will deal with 182.

The statement was made that all you have to do is look at 182 and you can see the effect of those agreements that these fellows enter into. You see the operation of these agreements. Well, what agreements is he talking about? With whom? In the first place, he cuts his figures off at 1934. If he had gone back to the period covered by his complaint—we will present those figures to your Honor tomorrow—you will see that the great drop in imports took place at the time the tariff went up. The Japanese imports, the evidence that is coming along will show, were all of plain cellophane, of very poor quality. No moistureproof cellophane could be imported because we had a moistureproof patent, which gave us the right to exclude imports.

3744 Now, when he says, the effect of these agreements, what is he talking about? We had an agreement with La Cellophane. La Cellophane sold through us for a while and then when the local manufacture got started La Cellophane stopped shipping here and the market was supplied by local manufacture. There were license agreements between La Cellophane and two other manufacturers with whom we had also licenses which precluded their sale here. But there was a whole host of other fellows who weren't involved in any agreements with us, in Europe, manufacturing cellophane, and there has been no proof of any agreements with them, and they didn't ship here either, and the reason they didn't ship was because the tariff went up substantially. And you can see the effect of it when the complete figures are presented to the Court——

Mr. MINICUS. Your Honor——

Mr. GESELL. Excuse me, Mr. Minicus.

Mr. MINICUS. May I point out at this time that there has been no proof of a whole host of other fellows manufacturing cellophane in Europe, to this point in the trial.

Mr. GESELL. There has been proof of two of them. Two very strong and powerful ones are in this case, Wolff, or Transparit as it is sometimes called, and the other is Sidac, and there is no proof of any agreement of any kind or form that we made with either of them. And if these figures were fairly presented to the Court, instead of this arbitrary selection of a date that suits the
3745 convenience of the Government, it would be perfectly clear that the decline in imports, whether we had dealings with the importers or didn't, took place when the patent issue and the tariff was imposed.

The COURT. A point of information from Mr. Tubridy. What significance do you say I should give to those Japanese imports?

Mr. TUBRIDY. The Japanese company has been the only company that we have shown has not been connected with any of these cellophane arrangements. Every other one of the cellophane companies has been tied in in one degree or another. We saw in that arrangement that they had a meeting of a group of people, one of the groups where the quota was to be increased if they did not sell a certain amount in the United States.

The COURT. In other words, these figures shown on Government's Exhibit 482 as they relate to Japan represent sales of an independent Japanese cellophane manufacturer?

Mr. TUBRIDY. They were imports from Japan, yes, sir.

* * * * * *

3759 (The letter from Mr. Yerkes to Colonel W. C. Spruance, dated July 29, 1925, was received in evidence and marked "Government's Exhibit no. 1068.")

Mr. TUBRIDY. The top letter is dated July 29, 1925. It is addressed to Colonel W. C. Spruance, Vice President:

"RE: CELLOPHANE IMPORTS—BIRN & WACHENHEIM

"DEAR BILL: I am enclosing copy of letter from our Buffalo attorney, Mr. Sawyer, in reference to Birn & Wachenheim and the whole Cellophane import situation. This letter, I think, is a very clear statement of our position and it seems to me that the
3760 point has been reached where the duPont Company should decide whether or not they want to test the validity of the Cellophane patents. From a purely selfish standpoint, they, of course, have nothing to lose. If the patents are not valid, they get back 10,000 shares of Cellophane stock, and if the patents are

valid, they are in a very much better position. I realize that there are other phases of this matter which you, undoubtedly, would like to discuss before coming to any decision, and I have not felt this matter should be broadcasted to the Board, except by and with the advice of you, as representing the duPont Company's interest in the matter.

"I am under the impression that you have in Squair's office all the correspondence and subject matter that lead up to the insertion of the 10,000 share clause in the agreement. In other words, I think you can answer in Wilmington better than we can, Sawyer's question, or rather his statement on page #5, that we should first consult with patent counsel as to the chances of sustaining or not sustaining the Cellophane patents. I believe this question has already been answered as well as it could be answered by re-opening it, and as I have said above, I think all the papers relating to it are in Wilmington. We are having, in the meantime, a search made here and if we find anything I will write you further in a day or two.

"In order that you shall be entirely familiar with the Cel-
3761 lophane status, I want to let you know that we are endeavoring to have the duty on Cellophane raised from 25% to 45%, and Curie, Lane and Wallace are of the opinion that we have a fair chance of getting this through. We have taken this step after much consultation with Curie, Lane & Wallace, and we can see no pitfalls of any kind. The duty either will remain where it is or it will be advanced. In other words, we have nothing to lose and everything to gain. I don't think we can bank on this increased duty, but I think it is a possibility and wanted you to know the facts in connection with your consideration with the whole matter.

"Yours very truly,

"PRESIDENT.

LAY:mm

"P. S. In connection with the first paragraph above and my statement as to the duPont Company's position, please bear in mind that the important Brandenberger patent is dated January 19th, 1911 and therefore runs out in 1928. In other words, even if the patents were declared 'not valid', we couldn't lose but probably one, or at the most, two years. If these patents had a long time to run I would consider the situation in a very different light."

Letter dated July 27, 1925, addressed to Du Pont Cellophane Company, Re: Birn & Wachenheim, by Dudley Stowe & Sawyer, part of Exhibit 1068:

3762 "DEAR SIR: At your request, I am writing to analyze more or less fully the elements of your present situation

with Messrs. Birn and Wachenheim and to suggest the appropriate action with respect to it.

"In the year 1922, and for some time prior thereto, Birn and Wachenheim were the authorized agents of the French Company for the sale of cellophane in the United States. In 1922 they registered the trade-mark 'Fenestra' for transparent wrapping paper in Class 27, paper and stationery. In 1923 the firm of Birn and Wachenheim lost their agency upon the incorporation of your company, and are not at present the authorized agents either of the French Company or your company. At the same time they are offering for sale, and are selling in some quantity, cellophane, which they represent is being manufactured in Germany, and concerning which your investigation has disclosed certain facts, to wit:—

"In a single instance a package of cellophane purchased from Birn and Wachenheim turned out to have been manufactured by your Company at the Buffalo plant. Your original label was partly destroyed but sufficient was left to identify the label itself, and the handwriting of the clerk who made the usual notations upon it. On this package Birn and Wachenheim had pasted their own label with the trade mark 'Fenestra' and the legend
3763 'Imported by Birn and Wachenheim'. The other packages which you have obtained from Birn and Wachenheim have been established as the product of La Cellophane in France, which you believe were obtained from the Belgian representative of the French Company without the latter's knowledge or connivance.

"You have asked us to consider various aspects of the matter and to advise you in respect of each of them.

"1. The trade mark situation. The trade mark laws look mainly to the protection of trade marks from imitation, which is not an element in this case. They do not forbid the removal of your trade mark from the article to which it belongs after its sale by your company. Further, since every such sale by Birn and Wachenheim means a sale for your company, it is difficult to spell out any damage upon which to base a legal or equitable claim. There is a possible, though speculative, loss of the advertising value of your trade mark on the packages from which they have been removed, but we doubt whether you could establish any right to such advertising after the outright sale of your product.

"The words 'Made in Germany' on the Birn and Wachenheim labels are false, if your information is correct, as are also the words 'Imported by Birn & Wachenheim' on any cellophane of your manufacture. The Penal Laws of New York State contain
various specific prohibitions against the use of false labels
3764 or trade marks, and make their use a misdemeanor punish-

able by both fine and imprisonment. A copy of Section 436 and portions of Section 2354 of the Penal Law is enclosed for your reference. It is possible that either or both of the labels violate the provisions of these sections, and that information might be laid before the District Attorney of New York County, which might result in prosecution and conviction. This would involve very considerable inconvenience to your company in supplying the necessary proof in the City of New York, and we doubt whether it would furnish a permanent solution. The offending labels could readily be corrected in a manner not to interfere with Birn & Wachenheim's business, and the practical condition would remain unchanged.

"Our conclusion is that you have no effective remedy under your trade mark rights and that you must rely upon your patents for relief.

"2. The patent situation. I have no doubt that the sale by Birn and Wachenheim, in this country, of cellophane made by the French Company under patents identical to your patents constitutes an infringement for which you have the remedy of injunction against future infringements and damages for past sales. This would give you complete protection for the life of the patents and is the only effective remedy you have. Such an action would, if defended, at once involve the question of the validity of
3765 your patents, and therefore requires thorough consideration before it is undertaken. An adverse decision would, of course, open the door wide to the sale in this country of cellophane wherever made, and your only protection in that event would be the tariff duties, and the technical difficulties of manufacture. On the other hand we may assume that Birn and Wachenheim know that they are infringing the patents, and may be acting under legal advice that the patents can be successfully attacked. If you permit them to continue the sale of French cellophane without attempting to stop them you will be no better off than if you had no patents, assuming that their business will grow and their competition will become more important, if they find that they are not interferred with. The prospective erection of a plant in Germany in which they are interested gives some point to this phase of the matter. I have examined the contract of June 9th, 1923, between E. I. duPont de Nemours & Company, and the Arena Trading Corporation, and also the contract of December 26th, 1923, between duPont Cellophane Company and the Arena Trading Corporation. I find nothing in either contract, which either in letter or spirit would prevent your testing the validity of the patents by such an action, or would require you to consult with the French Company before doing so. The ownership by your company of the patents certainly carries with it

the right to defend them. in fact paragraph 5 of the first
3766 contract contains the agreement of the Arena Company and its associates to assist you in the protection of the patent rights. Further than this, the five year provision in reference to the Escrow stock would seem by necessary inference to give your Board of Directors the right to take any reasonable steps to determine the amount of patent protection which your company actually has, and the prosecution of an infringer is the most direct and appropriate conceivable means of making such a determination.

"3. Mr. Bernheim suggests your seizing the imported cellophane upon its arrival at the customs. We know of no statutory provision nor any principle of common law which entitled you to make such a seizure.

"In our opinion you should permit us to consult with your patent counsel, and first have him examine the patent situation thoroughly and give you an opinion upon the validity of your patents, before deciding whether or not to take legal proceedings against Birn and Wachenheim. If the validity of your patents is sustained in court, you will be entitled to a permanent injunction which will prevent them from selling any cellophane other than your manufacture, in any part of the United States, and you will also be entitled to damages and lost profits for their past business. If counsel's opinion is against risking the validity of your patents you will have to negotiate with Birn and Wachenheim on a very different basis."

3767 Section 436 and 2354 of the New York Penal Law are attached.

The Government offers in evidence Exhibit 1069, page 1153, dated August 3, 1925.

(The letter from F. Sparre to W. C. Spruance, dated August 3, 1925, was received in evidence and marked "Government's Exhibit No. 1069.")

Mr. TUBRIDY. This is a letter from Mr. Sparre to Mr. Spruance, copy to Mr. Lammot duPont, dated August 3, 1925:

"With reference to your letter of July 31st and enclosures relative to possible law suit against importers of foreign cellophane for infringement of our cellophane patents, I am very much in doubt about such suit being brought against any importer. I am not up-to-date on the cellophane patents inasmuch as I have not seen any new application for patent during the past year or more. However no suit can be brought on infringement of any pending application for patent so that a suit will have to be brought on the basis of already issued patents. I believe I am familiar with all of the issued patents and that they are all of them process patents. It should be considered very carefully by our attorneys

whether if is worthwhile to bring a suit on the strength of our patents. My belief is that it would cost a whole lot of money and that we would lose in the end, that is if the other side would be willing to fight.

3768 "With respect to the determination of whether the patents owned by the Cellophane Company give complete protection from the standpoint of the ten thousand shares of capital stock held in escrow, I do not think that we should go to any lawsuit for the determination of who should be the owner of these ten thousand shares. I think that question should be decided on the strength of opinion given by patent attorneys and the business judgment of the members of the Board of Directors.

"I think the time has come when the board should be advised relative to the strength of the patents and an opinion should be obtained from a disinterested patent attorney. I do not think that the duPont Company's Patent Division should render this opinion nor do I think Bonnelicke's opinion should be accepted by the board. I would suggest that we should get the opinion of Prindle, Wright, Neal & Bean or Pennie, Davis, Marvin & Edmonds. I favor the latter firm because they are not connected with the duPont Company in the way the firm of Prindle, Wright, Neal & Bean is, and therefore all of the members of the board might be more inclined to accept an opinion given by Pennie, Davis, Marvin & Edmonds."

3769 Mr. Tubridy. The Government offers into evidence Exhibit 1070, appearing at page 1154. This is a letter to Dr. Sparre from Mr. Spruance, dated August 4, 1925.

(Letter from Mr. Spruance to Dr. Sparre, dated August 4, 1925, was received in evidence and marked "Government's Exhibit No. 1070.")

Mr. Tubridy. Exhibit 1070 reads as follows:

"Referring to your letter of the 3rd inst. regarding the Cellophane patent situation:

"I am inclined to agree with the opinion expressed in the first two paragraphs but do not feel that I can concur, at this stage, in the suggestion covered by the last paragraph of your letter. The agreement between the DuPont Company and the Arena Trading Corporation dated June 9, 1923, Section 7 provides that the Arena Trading Corporation shall have the right at any time within five years to call upon the Board of Directors of the DuPont Cellophane Co., Inc. to once and for all determine whether or not the amount of patent protection then being enjoyed by DuPont Cellophane Co., Inc. is equivalent to that set forth in the agreement between the parties dated January 6, 1923, etc. Further on in this same section it is provided that if the Arena Trading Corporation does not make such a request within five years, the Cellophane

Company directors shall forthwith determine the matter if in the interim the said Board of Directors has not of its own
3770 volition decided the question".

"My present view of the matter is that if the interests of the Cellophane Company in the opinion of its Board of Directors necessitate or justify determination of the patent status in advance of any request from the Arena Trading Corporation to decide the matter, the Board has an entire right to so proceed prior to the expiration of the five-year period, but I am very much in doubt as to whether the best interests of the Cellophane Company at this time will be served by testing or otherwise determining the patent status by bringing the issue with Birn & Wachenheim to a conclusion in the courts or otherwise based upon existing cellophane patents. In other words, I think if the Board was satisfied that the patents were strong and comprehensive, for instance if we had a strong product patent, I think the Birn & Wachenheim situation would be ample ground for the Board to take definite steps based on such patent protection. This is not as I see the present condition, and besides the cost involved I think there would be grave danger of jeopardizing the Company's ultimate interest by proceeding along such lines at this time. The chances of the existence of strong patent protection by the end of the five-year period may not be great, but I do not see how they could be any less than at present, with the exception of the fact as noted in Mr. Yerkes' postscript to his letter of July 29th to me that one of
3771 the Brandenberger patents would expire January 19, 1928, whereas the five-year period expires June 9, 1928.

"Looking at the problem from the DuPont Company and Arena Trading Corporation standpoints respectively, I think our French associates are under the agreement entitled to the privilege of allowing the entire five-year period to elapse if they so elect, unless in the interim important interests of the Cellophane Company and its welfare and success are clearly served, and furthered by the Board initiating the determination of the patent status at any time within the five-year period, and I do not think it likely that these conditions apply to the present situation. As regards the DuPont Company's interests and the ultimate ownership of the 10,000 shares and any dividends, stock or cash that may be declared within the five-year period, I think the contract covers such contingencies on a mutually equitable basis, which you will remember provide for the delivery of such dividends to the extent of the interest of the DuPont Company in them, and that if payment is made by the Arena Trading Corporation to the DuPont Company, the contract provides that such payment shall be without interest thereon ad interim. This payment being $144,444.94.

"I agree with you that if the Board of Directors of the Cellophane Company at any time undertake an investigation of
3772 the patent situation, it would probably be better for them to retain Pennie, Davis, Marvin & Edmonds. While an official communication from Lee to the Board with a view to action at this time in the premises by the Cellophane Company would, I think, be inopportune, I believe it would be well for him to consider informing the Board at the September meeting of the current situation as regards the Company's patents and trade marks. Further, it does not seem to me that existing circumstances necessitate or justify formal report with recommendations for action to the DuPont Company Executive Committee by the DuPont representatives on the Cellophane board.

"I expect Mr. Yerkes here today to further discuss his letter to me of July 29th and will confer further in the premises with him, you and Mr. Lammot duPont."

The Government offers in evidence Exhibit 1071, appearing at page 1156, dated August 4, 1925, from Mr. Spruance to Mr. Yerkes.

(Letter from Mr. Spruance to Mr. Yerkes, dated August 4, 1925, was received in evidence and marked "Government's Exhibit No. 1071.")

Mr. TUBRIDY. That reads as follows:

"Referring to your letter of July 29th and my letter to Sparre and Lammot duPont of July 31st, copy to you:

"I received this morning letter from Sparre as per attached copy, dated the 3rd inst. and thought it well to write him
3773 setting forth my tentative impressions of the situation as per copy of letter of even date herewith, and we will discuss the matter in more detail today.

"Upon receipt of your letter of July 29th I called up Mr. Squair's office but found that he would be out of town until August 7th, so I have not had the benefit of his advice or the opportunity to review correspondence and papers in his office with which I may not be familiar. I suggest that you go over this whole matter with Mr. Squair at your early convenience after his return.

"As regards the steps you are taking to change the duty on Cellophane, I think this is a perfectly proper course to pursue and in the interests of the Cellophane Company, but I am not inclined to the opinion that at this stage either the DuPont Company or the Board of Directors of the Cellophane Company should initiate or force an issue with a view to establishing the status, scope and strength or existing Cellophane U. S. patents.

"As regards the effect of Birn & Wachenheim's operations on the interests and profits, present or prospective, of the Cellophane Company, I do not see why this situation is not likely to be of

short duration and that from the standpoint of both probable ultimate outcome and time required, the Cellophane Company would do better by not testing the patent situation and counting rather on Birn & Wachenheim losing interest in the matter
3774 in the comparatively near future as a result of increase in the duty from 25 to 45% and/or La Cellophane being successful in their efforts, which they are doubtless making and which it is up to them to vigorously follow up, to prevent quantity shipments of their product from Europe or England to the United States."

The Government offers in evidence Exhibit 1072, appearing at page 1157, a letter from the Treasurer to Mr. Sawyer, dated August 8, 1925.

(Letter from V. P. and Treasurer to Mr. Sawyer dated August 8, 1925, was received in evidence and marked "Government's Exhibit No. 1072.")

Mr. TUBRIDY. Exhibit 1072 states as follows:

"In connection with your recent letter with special reference to the suggestion that we might be able to stop Birn and Wachenheim through a suit on the grounds of infringement of our U. S. Patents, would say that this matter has been very carefully discussed and decision reached that we will not proceed along that line.

"For the time being we are going to use our best efforts to have a revision made in the import duties.

"I am rather inclined to think, after our talk with Dr. Rocker, that you would approve of this latter course."

That is the last document the Government has in connection with this group, your Honor.

3775 Mr. GESELL. Well, I don't know what the Birn & Wachenheim incident is after all of this reading. I do know one incident that was put into this case in very full terms, and which I understand the first two documents concerns. And before dealing with the others I would like to discuss that.

If your Honor will turn to paragraph 36 (c) of the complaint you will see a vicious charge there made that duPont has induced others to breach contracts with certain competitors. Now, on pretrial the Government was directed to give us a statement as to who it was we had induced to breach a contract, and after a compliance and some correspondence we got this response, which is in the record of this Court, in respect of what I understood to be the Birn & Wachenheim incident. The Government stated that although paragraph 9 of the aforesaid order does not specifically require disclosure of the contracting dates, we are happy to supply this information in the interests of complete discovery. On or about November 5, 1922, Societe La Cellophane agreed to sell certain quantities of cellophane to Birn & Wachenheim on specific

orders. The Government contends that this contract to sell, together with certain unperformed accepted orders devolving therefrom, including one dated January 2, 1923, were breached at duPont's inducement. And we have offered here two documents in support of that contention, and I want to deal with—

Mr. MINICUS. Your Honor, I would like to say that those——

3776 The COURT. Well, Mr. Gesell has not finished his statement. Do you want to address yourself to the first two exhibits in connection with this last group that Mr. Tubridy put into evidence?

Mr. GESELL. The first two of the group.

The COURT. Go ahead and complete that. Is there objection?

Mr. MINICUS. Yes, sir. It is based on the wrong assumption, that Mr. Tubridy put these documents in for the purpose of showing the breach of contract. I ask your Honor's attention to page 3 of the index, on the sixth line, where we have a heading, "The Birn & Wachenheim Incident," at page 3929. That shows that at a later point in the trial we are going to introduce evidence in great detail on this Birn & Wachenheim incident——

The COURT. In support of the allegation on paragraph 36, subparagraph (c)?

Mr. MINICUS. That is our position, your Honor.

The COURT. Does that clarify it for you, Mr. Gesell?

Mr. GESELL. No, it doesn't. Those documents don't relate to it. These are the documents that relate to the contract breach, and I think I should discuss them because that is what they are about. If they don't relate to that, what do they relate to? What is the incident that they relate to now?

3777 The COURT. What is it, Mr. Minicus?

Mr. MINICUS. May I ask Mr. Tubridy to answer that question, your Honor?

The COURT. Yes.

Mr. TUBRIDY. I prefaced my remarks when I opened with this incident, pointing out to your Honor that the reason some of these documents were here in this connection was that they would be discussed at a later date, that is, evidence in connection with Birn & Wachenheim, and that also since this information, the latter part of this incident, related to Birn & Wachenheim, in order to have your Honor have complete information as to who Birn & Wachenheim were, how they came into the cellophane picture and what their relationship was, I put those two documents in a prefatory manner.

The incident to which we are primarily directing ourselves at this time is the methods that were going to be used by duPont in order to prevent Birn & Wachenheim from competing in the

United States with regard to cellophane. And that is what we are directing our attention to at this particular time.

Mr. GESELL. Wouldn't one of those be the alleged breach of the contract which stopped them from getting ——

Mr. TURRIDY. Yes, but ——

Mr. GESELL. —— which stopped them from getting the imports of cellophane in accordance with what the Government
3778 alleges? I want to get to the issues of this case and stop shadow boxing with this organization of documents which always prevents a discussion of the facts.

Mr. MINICUS. If Mr. Gesell wishes to discuss the breach of contract at this time, with the understanding that we will put the evidence in on it later, that is perfectly agreeable to us, your Honor.

The COURT. Well, I think the way to resolve it is to let Mr. Gesell have his discussion and we will see precisely what it is that will come forth.

Mr. TURRIDY. We can either do that, your Honor, or we can withdraw the initial two documents.

The COURT. Oh, you have them in now.

Mr. TURRIDY. We can put them in at a later date.

* * * * *

3782 Mr. GESELL. If we turn to the second group of these Birn & Wachenheim documents, I am not aware of what the Government's position is concerning them. These documents concern whether or not duPont would undertake to bring a patent suit against Birn & Wachenheim under its patent that it had gotten primarily from the French relating to plain cellophane. I ask your Honor to note that they are all dated back in 1925. The moistureproof cellophane patent didn't issue until 1929. There was no moistureproof being made at this time anywhere in the world, and this concern was enforcing some plain cellophane patents which Birn & Wachenheim, according to the documents, was infringing.

These are the same patents, your Honor, that were made the subject of that discussion in Dr. Sparre's development report which was the second exhibit we considered in this case
3783 back, I guess it was last Thursday, Exhibit 392. These are the same patents that Dr. Sparre was considering back there.

3784 They are the patents, your Honor will recall, which the agreements between duPont and La Cellophane left open for subsequent evaluation, because at the time they were acquired there were doubts as to their strength. Eventually the French had to pay us $100,000 on account of the rights they had gotten

for those patents, which subsequent analysis proved not to be of any particular worth.

These are also the same patents that Mr. Minicus referred to in discussing that exhibit at page 134 of the printed transcript as proving, when he was talking about 392, that duPont was pulling together some patents of doubtful value for offensive use as a monopolist. Now, the plain fact that these documents show is that when it came down to the question should we use the patents in order to impede Birn & Wachenheim, a competitor, we reviewed the patents; we decided they were of no particular value and we never brought suit on them against Birn & Wachenheim or anybody else. I don't think that is a monopolist, pulling together worthless patents for the purpose of using what the Government calls an offensive weapon against competitors. The patents came to us as part of the rights that we got from the French. They proved to be of little value against the supreme value of the know-how. We appraised them in a businesslike manner by getting opinions from competent patent people. We never enforced them against anybody. We never used them as
3785 an offensive weapon against anybody, and we said to the French, "As business men, you put something over on us. These things aren't worth very much." And they paid us through the arrangements that were made $100,000.

I see nothing in that which is indicative of monopolistic activity, abuse of patents, or any of the things that the Government has been talking about. What the incident is, I don't know. Is it that we did not bring suit? I can't see that significance from the Government's side. Or is it that we thought about bringing suit? Well, if we went about it in a businesslike way and thought about it and didn't do it after we had an appraisal of the patents, I can't see how we have done anything wrong.

Your Honor, consider the heading under which these documents are presented to the Court today. They show, according to the heading, the specific effects of the La Cellophane relationship. What the Government wanted to show was that we got some doubtful patents, though of course they are valid under the stipulations of this case. We got some doubtful patents from the French, and we enforced them against a competitor, and that that was the specific effect of the agreement; when, in fact, we never did, and I can't see any improper effect of the agreement shown. We go right down to the inside of the company in its operations and thinking, and see the letters of the officials as well as
3786 the letters from their counsel, and all of it is a straight, businesslike approach and nothing more. The Government can't show, because it is not a fact, that these patents were ever asserted against Birn & Wachenheim or anybody else. You

get a little foretaste of things to come in 1070, where Mr. Sprunance is discussing this situation, and you know he distinguishes between these patents and the situation which might exist if we had a strong product patent. That was 1925, and four years later we did have a strong product patent, the moistureproof patent, and at that time exercising our rights as patentee we took a strong position.

Finally, at the bottom of Exhibit 1071 great stress was laid upon the last few sentences of that exhibit referring to the fact that La Cellophane were taking steps to prevent shipments of their product from Europe to England to the United States, but you will note, your Honor, it says "their product" and they are bound by contract to deal with Du Pont Cellophane Company, their subsidiary, and that is simply a reference to the straight operations of the agreement under which they agreed at the time they set up this company to sell only through it.

Mr. TUBRIDY. Your Honor, I would like to point out one thing, if it pleases the court: on what basis could they agree not to compete if their patents were no good?

3787 Mr. GESELL. I could interject a very interesting legal argument, if your Honor wants to have it now.

Mr. TUBRIDY. In the National Lead case, your Honor, they tried it when their patents were good and they said they could not do it.

The COURT. We will have a time set for argument.

Mr. TUBRIDY. Shall we take a recess now, sir?

The COURT. All right.

Adjourn court until tomorrow morning at 10:30.

(At this point the trial was adjourned to Thursday, January 25, 1951, at 10:30 o'clock a. m.)

* * * * * * *

3791 THURSDAY, JANUARY 25, 1951; 10:30 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. If your Honor please, yesterday when we were discussing Birn & Wachenheim and the earlier import statistics which are in Government Exhibit 182, your Honor stated that he would also take judicial notice of the figures back to the year 1930 if they were called to your attention. I have a schedule containing the figures back to 1930 and will hand a copy to the Government for them to check, and I would like to hand one up to the Court, if I may.

The COURT. After you examine the figures, Mr. Minicus, at your leisure during a recess, if you have any objections state it to me.

Mr. MINICUS. I would state just now if we are taking them to 1930, let us take them all the way back.

The COURT. To when?

Mr. GESELL. The 1930 date related to the complaint.

The COURT. I find it good practice sitting on the bench only to rule on matters that are before me. Presently I have a document handed to me which contains the figures for the years 1930 to 1933. I think the document yesterday covered——

3792 Mr. GESELL. 1934 on, your Honor.

The COURT. Therefore I shall take judicial notice of the writing which has been handed to me. For the purposes of the record I think it should be marked in some fashion by the clerk.

Mr. GESELL. Perhaps it could accompany Exhibit 182 as 182-A.

The COURT. Very well, let it be so marked.

(The paper containing import statistics from the years 1930 to 1933 was received in evidence and marked "Government's Exhibit 182-A.")

Mr. GESELL. I think also, your Honor, we would like to ask that the Court in this same connection take judicial notice of the Tariff Act of 1922, and the Tariff Act of 1930, and the litigation between Du Pont Cellophane Company and the United States and Birn & Wachenheim on this subject to imports and import duties; and if it is agreeable to the Court, I will simply hand the citations of those acts and the cases to the reporter to copy into the transcript for future reference.

The COURT. Please do so.

(The paper referred to reads as follows:)

"PERTINENT TARIFF STATUTES AND JUDICIAL DECISIONS

1. Tariff Act of 1922, 42 Stat. 858, especially paragraphs 31, 42 and 1213.

2. Du Pont Cellophane Company v. United States, T. D.

3793 No. 43232; 55 T. D. 327 (Feb. 20, 1929).

3. Du Pont Cellophane Company v. Birn and Wachenheim, 17 CCPA (Customs) 122; T. D. No. 43454; 55 T. D. 926 (June 12, 1929).

4. Tariff Act of 1930; Act of June 17, 1930, c. 497; 46 Stat. 590; 19 U. S. C. 1001; especially Para. 31 (c).

3794 Mr. TUBRIDY. With regard to this new exhibit which has been offered in evidence, which I understand is 182-A, we would like to reserve the right to comment on this further, your Honor, when we have a chance to go into it in detail. But immediately I would like to point out to your Honor that we still have with regard to the years 1930, '31, '32 and '33 no really substantial imports except from Belgium in the year 1930, 198,000; 1931, 32,000; then it drops to 8,000 in 1932; in 1933 to nothing, and with regard to that figure 198,719, we would like to show your Honor at a later time what these imports really were.

Now, we have just two rather short groups to take up, and then we will be through with this particular section which comprises Book 8. This group is with regard to the complaints and compliances regarding these territorial restrictions.

The Government offers in evidence Exhibit 1058, appearing at page 1105.

(Letter from Mr. Yerkes to Mr. Hall dated July 30, 1937, was received in evidence and marked "Government's Exhibit No. 1058.")

Mr. TUBRIDY. It reads:

"Mr. Goetz of Rose & Paskus telephoned me about the film for the Bernheim Ozalia and electric sound production material. He told me that Mr. Roger Bernheim had understood that you
3795 had agreed to an importation of French material to the extent of 1,000 tons a month for a period of 6 months. I told him I thought he had gotten the tons mixed up with the pounds. We certainly could not agree to their bringing in 1,000 tons a month for 6 months. (Mr. Goetz later confirmed that my understanding was correct.)

"They are endeavoring to make an arrangement with the German Ozophane Company whereby they will have the use in this country of the chemical Ozalid in the preparation of the sensitizing and developing of the 'Cellophane' picture film. In order to do that they feel that the Germans will want an assurance that either we will agree to supply the American company with all the 'Cellophane' that they may need or failing that agree to let them import it.

"Mr. Goetz, assuming that we would want the business if the tonnages were of moment, suggested that we might be able to arrange a price formula based on our cost plus a percentage for profit equal to our profit on other 'Cellophane' film.

"I certainly wouldn't do this on the basis of our profit on plain P. T., but we might do it on the basis of our profit on specialties. At any rate, I feel that all we would have to do would be to go a little bit under the cost to them of importing the material plus the duty, freight, insurance, etc.

3796 "It seems to me we shall either have to agree to let them import or agree to supply them here. I also have a recollection of your having given Rene Bernheim a year ago an approximate price on this special 'Cellophane' for this purpose.

"I would like to talk to you about this matter.

"P. S. Later I talked to Mr. Goetz again, and told him I was going to be away for a week and that if there were any further developments that needed attention during the week to call you or Mr. May. I don't imagine anything further will develop during that time."

3797 The Government offers in evidence Exhibit 1073, appearing at page 1158.

(Letter from Yerkes to Mr. Hatt, dated July 3, 1930; letter from Yerkes to Brandenberger dated July 3, 1930, and letter from Hatt to Brandenberger dated July 22, 1930 were received in evidence and marked "Government's Exhibit No. 1073.")

Mr. TUBRIDY: The top page of this exhibit is a letter from Mr. Yerkes to Mr. Hatt dated July 30, 1930. It reads:

"I am enclosing Mr. Brandenberger's letter of June 21st and my reply. It seems to me that we can stop this exportation of Cellophane for millinery purposes.

"As I understand it we have only a few customers and I think it would be in order to definitely insist, under a penalty of some kind, that they do not re-sell millinery Cellophane, but buy it only under the distinct understanding that it is for their own use.

"I will be glad to talk to you about this after you have had an opportunity to look over the attached."

The attached letter is dated July 3, 1930, from Mr. Yerkes to Mr. Brandenberger. It reads:

"I have given your letter of June 21st, regarding the American Cellophane for millinery purposes which you think is get-
3798 ting into Switzerland, to Mr. Hatt, and I have asked him to use every possible precaution to stop this.

"As we do not sell a great deal of millinery Cellophane, and only to a few people, we should be able to control it so that it should not be exported."

The last letter of Exhibit 1073 is from Mr. Hatt to Mr. Brandenberger dated July 22, 1930. It reads:

"Referring to your letter of June 21st to Mr. Yerkes, regarding millinery Cellophane for Switzerland: We have checked up thru our purchasers of millinery Cellophane in America and cannot locate any man by the name of Schwab connected with any of these concerns, and likewise, these customers claim to be unable to tell us anything about a man of that name who might be interested in millinery Cellophane. Each of them assures us that their purchases from us have been for their own use.

"We have asked our representative who contacts this trade to be alert in his relations with them in an effort to determine whether any of this material is intended for other than their own consumption.

"Our sales of millinery Cellophane have been practically nothing since March of this year on account of the present lack of seasonal demand, and therefore, at the moment we are sending out very, very little.

"Like yourselves, we get a higher price for our special mil-
3799 linery Cellophanes and for the one we sell the most of, our

present price figures 70 French francs per kilogram, f. o. b. Buffalo so that under prevailing prices, you can see it would be impossible to export this. Even on Regular #300 Cellophane in rolls, prices in effect during last Spring (the millinery season) would figure 51 French francs per kilogram, f. o. b. Buffalo, to which would have to be added rail freight and ocean freight, special packing charges, etc., so you can see from this, it would be practically impossible for them to export our material at your present prices prevailing on millinery Cellophane.

"It may be that a claim of this kind is made by the customer in an endeavor to buy your material for lower values.

"As stated above, we are instructing our representative handling this business, to see that only material for domestic consumption is supplied to these millinery manufacturers.

"If we can serve you further at any time, please advise.

"Very truly yours,

"J. E. HATT,
General Manager."

The Government offers in evidence Exhibit 1074.

(The letter from R. A. Ramsdell to Kalle and Company, dated July 22, 1932, was received in evidence and marked
3800 "Government's Exhibit No. 1074.")

Mr. TURAMY. This is a letter addressed to Kalle & Company. Apparently copies went to Mr. May, but I don't have the ending of it, sir.

"This acknowledges your favor of June 29th on the subject of Scotch Cellulose Tape and its sale in Germany. We would be glad to minimize this competition for you if such a thing were possible, but the facts are we can do nothing more than suggest to this concern that they refrain from shipping their material to Germany.

"This, they are not likely to do because we believe they have offered it on a world-wide scope and we have no control over the situation because they buy their material from competitors as well as from ourselves.

"We venture to suggest it might be in order for you to write this concern direct, suggesting you be permitted to manufacture the material for them in Germany for distribution to their agencies and under their patents, if they exist in your country as they do in this country, and perhaps operate more advantageously for them in the way of service to their trade than is now the case. We have no direct dealings with them other than that of their buying an occasional lot of our material, and as above indicated no way of controlling their activities.

"We doubt seriously, however, whether they can
3801 make substantial inroads into your territory against goods

of German manufacture if your product is equally as efficient as their own.

"This condition is not different from what we find here in America on millinery braids from Czecho-Slovakia coming into this country and, we imagine, made from material of your own manufacture. We recognize this is not imported at all as Cellophane, but rather as millinery braid and therefore, it would be impossible for you to control it and we are about in the same shape as regards the cellulose tape."

The COURT. What did that record show the imports to be from Czecho-Slovakia?

Mr. TUBRIDY. What, sir?

The COURT. That would not be listed as an import, millinery braid.

Mr. TUBRIDY. It may not be, sir. You can't tell.

3802 The next is a memorandum dated September 27, 1932, copy of which was sent to B. M. May, signed by Mr. Ramsdell. The Government offers this exhibit in evidence, Exhibit No. 1075, page 1163.

(Memorandum from Mr. Ramsdell, copy to Mr. May, dated September 27th, 1932, was received in evidence and marked "Government's Exhibit No. 1075.")

Mr. TUBRIDY. It reads:

"With reference to the case that has come up in Chicago between the United States Customs Service and an importer of Cellophane wool, we have obtained a sample of the Cellophane wool in question and find that it is shredded Cellophane that has been dyed after shredding. It is a similar product to one that several of our converters of Cellophane Waste are now marketing in this country.

"Arrangements have been made to have Mr. W. J. Harte, Central Sales Manager, supply a witness at the hearing in Chicago.

"In the meantime, the writer feels that Kalle Company should be advised by our company that they are stepping out of their territory in offering this Cellophane wool in the United States. The writer has examined the papers and invoices and finds, definitely, that the shipment was made directly from Kalle in Germany to the Boston Store of Chicago."

3803 The Government offers in evidence Exhibit 1076, appearing at page 1164. This is a letter from La Cellophane to Mr. Hatt, dated May 18, 1936, captioned "Australia."

(Letter from Mr. Meyer, La Cellophane, to Mr. Hatt, dated May 18th, 1936, was received in evidence and marked "Government's Exhibit No. 1076.")

Mr. TUBRIDY. It reads:

"We notice from the official Import Statistics of Australia that there have been imported into Victoria during February 1936 64 cwts. of transparent Cellulose of U. S. A. origin.

"Would you be so kind as to go into the matter and trace, if possible, the shipper of above goods.

"Hoping to hear from you, we remain, dear Mr. Hatt,

"Yours very truly, F. Meyer."

The COURT. To refresh my recollection, who had the Australian territory?

Mr. TUBRIDY. At this time?

The COURT. Yes.

Mr. TUBRIDY. In 1936 British Cellophane had this territory. I think that agreement is dated 1935.

The COURT. Just give me some reason as to why La Cellophane is writing to Du Pont about this matter.

Mr. TUBRIDY. Before British Cellophane Limited came into this, this was part of La Cellophane's territory.

3804 The COURT. I am speaking as of May, 1936, and I want to find the purpose of this letter, that is all.

Mr. TUBRIDY. Well, the purpose of this letter is to tell Du Pont not, "to send your products into Australia. That is not your territory."

The COURT. If it was no business of La Cellophane, why were they writing the letter?

Mr. TUBRIDY. We will show you later on. A lot of this was no business of La Cellophane. It was part of this group, part of the club.

The COURT. But the man whose feet were being pinched I would think would articulate the objection. I cannot see the role La Cellophane is playing in the picture at this point. That is the only reason I make the inquiry.

Mr. MINICUS. We will show later that La Cellophane was a stockholder in British Cellophane Limited.

Mr. TUBRIDY. The Government offers in evidence Exhibit No. 1077, addressed to Mr. Meyer, signed by Mr. Hatt, dated May 23, 1936, captioned "Australia."

(Letter from Mr. Hart to Mr. Meyer, dated May 23, 1936, was received in evidence and marked "Government's Exhibit No. 1077.")

Mr. TUBRIDY. It reads:

"This acknowledges your letter of May 18th regarding the shipment of American-made transparent film into Australia.

3805 "We, ourselves, have not sent any such material, and we have no record, and no way of obtaining any information,

as to what may have been shipped by others. A quantity of this kind would not be a miscellaneous lot and it, undoubtedly, does represent the product of our competitor because any business of which we had any knowledge, originating in Australia, would be referred to you.

"Our relations with the competing concern are not such that we are in position to determine whether or not they have made such shipment, inasmuch as we do not exchange information of this kind with them.

"We regret exceedingly we cannot supply more definite information as to the source of this material."

The Government offers in evidence Exhibit 1078 appearing at page 1166. This is a memorandum from I believe it is Mr. Andrews to Mr. Benz re Heilbronn Company, Manila, Philippine Islands, dated February 24, 1939.

(Letter from Mr. Andrews to Mr. Benz dated February 24, 1939, was received in evidence and marked "Government's Exhibit No. 1078.")

Mr. TURRIPY. It reads:

"Our Philippine agents, Heilbronn, sent Mr. Kelsey a photostatic copy, attached, of a package label which appeared on 7 cases (15,000 sheets) of film which arrived at Manila on the
3806 S/S Empress of Canada, December 4, 1938, Reg. 1093; B/L 11, marks 'K & Co.', from Hong Kong.

"The Chinese marks which appear in the photostat alongside the Kalle label indicate that the film was ostensibly destined for Chinese consumption.

"Whether Kalle had any knowledge of its ultimate destination is of course not known, so we shall probably have to be content with merely calling the matter to their attention. I presume you will wish to do this.

"Just as a matter of information in connection with Kalle's activities, I have just learned that Bayer, Brazil are now placing their orders for seals with Kalle & Company. Imperial write us that Bayer have no complaint regarding the price of our product or of our quality, the only reason being that Kalle & Company have approached them so insistently that they thought they should give them the business and particularly so since both are German firms.

"It would appear from the foregoing that the 'powers that be' are forcing exports regardless of consequences."

The COURT. Who were they, the Nazis?

Mr. TURRIPY. I don't think it is the Nazis. I think it is—well, all I can do is give my opinion in connection with it. I think it is a way of indicating that Kalle & Company were exporting——

The COURT. "It would appear from the foregoing that

3807 the 'powers that be' are forcing exports regardless of consequences." Was Kalle being forced to export or was it doing the forcing?

Mr. TUBRIDY. I don't know, sir.

The COURT. Well, I don't know how I am to interpret these documents if I am not going to get some help, not that this is vital——

Mr. TUBRIDY. I don't know what is in Mr. Andrews' mind when he uses the expression "powers that be." There is no translation, no dictionary, no duPont code or anything of that kind that indicates who the powers that be are. I don't know how I can answer a question of that kind, though I would like to help you all I can.

The Government offers in evidence Exhibit 1079, appearing at page 11[illegible] addressed to Mr. Andrews, from Mr. Jenney, dated February 28, 1939.

(Letter from Mr. Jenney to Mr. Andrews dated February 28, 1939, was received in evidence and marked "Government's Exhibit No. 1079.")

Mr. TUBRIDY. "With reference to your letter of February 24th to Mr. Benz, on the above subject, we note that you state that Bayer of Brazil are now placing their orders for seals with Kalle & Company because both are German firms. It should also be noted that they are both subsidiaries of I. G. Farbenindustrie."

3808 The Government offers in evidence Exhibit 1483 appearing at page 7048 of Book 41.

(Excerpt from report dated April 23, 1926 to Board of Directors of Du Pont Cellophane Company, Inc., from L. A. Yerkes, President, was received in evidence and marked "Government's Exhibit No. 1483.")

Mr. TUBRIDY. This is an excerpt from the report dated April 23, 1926 to the Board of Directors of Du Pont Cellophane Company, Inc., from Mr. Yerkes. We merely want to call one part of this exhibit to your Honor's attention. That is on the last page of the exhibit, the last paragraph. It reads:

"There are one or more concerns bootlegging cellophane from the continent and are disturbing the market, doing a volume, as near as we can estimate, of between ten and fifteen thousand pounds per month."

That concludes this particular group.

3809 Mr. GESELL. While we are in 1483, your Honor, I don't know what inference you are asked to draw from the word "bootlegging", which appears in that very last paragraph.

The COURT. That was a loaded word in 1926.

Mr. GESELL. I take it it means that somebody was bringing in cellophane without recognizing the duty obligations. I don't know. There are other things in this document which I think

are of significance to the case which I should call to your Honor's attention.

On page 7051, where the bootlegging paragraph appears, you will notice the discussion of prices in that exhibit. Now, this is written in 1926 at a time duPont is embarking on its plan of steady price reductions, and you note what the report says:

"Price: This is still our main obstacle in selling Cellophane and will probably be with us always."

In the next paragraph:

"Last year we consider our price reduction gave us the real opportunity with the Grennan Cake Company and this year our price reduction brought into the fold the Ward Baking Company and the A. & P. in a larger way than they previously planned for."

If your Honor will recall my opening remarks to the Court, I emphasized that these price reductions were made for the
3810 purpose of broadening the market and getting ourselves into a position to compete with the other competing wrapping materials. You will see some indication of these wrapping materials elsewhere in the report. Take a look at "Candy" on the first page, just one last paragraph there on candy:

"This industry is well posted on the advantages of Cellophane and each price reduction we make opens up new opportunities in wrapping lower priced goods and small units."

MR. MINICUS. Your Honor, may I submit that none of the material or subject matter that Mr. Gesell is now commenting on was put into evidence for the purpose that he is commenting on. We have had occasion to have recourse to Wigmore on this subject recently, and Professor Wigmore has stated that it is permissible for counsel to glean whatever parts of information he desires from a particular witness or document, and that in commenting upon that counsel for the other side must restrain himself and keep to the particular subject matter that the first counsel has utilized.

Now, we don't question for one moment that upon his own case Mr. Gesell may use anything that is in these documents, but we do think that it places an unfair burden on us if when we put in a document for a particular purpose he is allowed on our case to search that document and elicit information from that document for the purpose which he believes will prove his own case.

In support of my position I cite Wigmore, Section
3811 1313—that is subject to verification—and cases therein cited, your Honor.

THE COURT. I don't know. I pay great and respectful homage to Professor Wigmore. I am thinking if you had a witness on the stand and you handed him a letter, I don't see where the ad-

versary to that letter would be restricted to only looking or examining on two or three lines contained in the letter.

Mr. MINICUS. That is not exactly the position I am striving for here, your Honor. They can turn to anything else in that letter that is connected with the subject matter that counsel proposing that letter has used it for, but they cannot on his case turn to other and unrelated subject matters that may be in that letter.

The COURT. I presume you make reference to the letter and you offer the letter for the purpose of showing a violation of the Anti-Trust laws. That is our first step. Now, Mr. Gesell comes along and says, "I want to show that I have not violated the Anti-Trust laws; that the significance which the Government is attempting to have the Court place upon the bootlegging paragraph, for example, in this instance, can be very much diluted if the Court will draw its attention to other provisions in that writing, because they will show a bona fide purpose and scheme of operation in the conduct of our business." Now, it seems to me that
3812 is Mr. Gesell's point as he makes it.

Mr. MINICUS. That would be our point, too, respectfully, your Honor, if Mr. Gesell can show some connection between the subject matter he is here discussing and the bootlegging clause, but I haven't seen any effort to connect this subject matter on prices up with the bootlegging clause.

Mr. GESELL. That clause appears under the heading "Prices," your Honor.

Mr. MINICUS. This is a matter, your Honor, that is apt to come up quite often from now on.

The COURT. Let me make this observation: the document containing the bootleg paragraph and a score of other paragraphs is in evidence, and it is before me and I should read it, the whole document. What are we talking about? I am going to have to read the whole thing anyhow. Your point is you don't like Mr. Gesell drawing my attention to specific provisions in it; is that it?

Mr. MINICUS. No, that is not it at all, your Honor. We believe that we have the right, whether it be a witness on the stand or a document that we are putting in, to elicit either from that witness or that document certain facts that are in his intelligence; and we also believe that counsel on the other side does not have a right with regard to the witness or to that document to elicit other
3813 facts unconnected with those that we have elicited until the time comes for him to put in his own case. In other words, if he wishes to make that witness or that document his own for other matters, that is entirely his privilege, of course; but he should wait until he puts in his own case and not avail himself of our material to prove his case when we are the proponents.

The COURT. Well, if you are correct, my whole understanding going back to common law principles—is the effect of demurrer was not recognized. You could always comment or demur or look at your opponent's evidence and you could capture it, if you wanted to, as arguments for your position.

Mr. MINICUS. That is perfectly true. But we have not relied upon these parts that Mr. Gesell is now discussing. They happen incidentally to be in the document. In other words, we are attempting to make a qualified offer of this document only for particular purposes, as if we had a witness on the stand we could limit his testimony to the facts we wanted to bring out. There is no doubt that once Mr. Gesell begins his case he can use that witness also to elicit from that man's intelligence——

The COURT. Then that brings us down to a very sharp legal question: can you offer a portion of a document in evidence?

Mr. MINICUS. According to Wigmore and quite a long
3814 list of cases you can. I would like to respectfully submit to your Honor that we would appreciate the privilege of filing a memorandum on this point.

The COURT. I would like to have it because it certainly would be helpful to me.

Mr. MINICUS. I think it will arise continually.

The COURT. Yes, I agree with you, Mr. Minicus. That point has got to be met sooner or later.

Mr. MINICUS. Do you care to set a time limit on the memorandum?

The COURT. What is your convenience, because we are all here working under——

Mr. MINICUS. We could have it ready by Monday morning.

The COURT. Next week?

Mr. MINICUS. Yes, your Honor.

Mr. GESELL. Again I am prepared to discuss it now if he wants to. The rule in Wigmore is clear. It says, "It would seem that the general tendency is to require the whole of the single document to be put in and treated as the evidence of the party desiring to offer a part only, even though the actual reading be postponed. This was not a limited offer, your Honor. This was an offer of the entire document. It is relevant and material to the case on many issues, and it seems to me the proper thing for me to
3815 do is when you have it before you to call your attention to those portions which will relate to issues in the case, whether they are being presented on that document now or whether they are going to come in under another section of the case.

The COURT. My present ruling is going to be that we are to follow the practice we have been following until Mr. Minicus can show that it is in error.

Mr. MINICUS. Very well, your Honor.

The COURT. In any event, if you want to have a discussion about that sometime Monday, I wish you would have somebody available on the defense in case you want to present the argument to me.

Mr. MINICUS. I am perfectly willing to submit it on memoranda, if that is satisfactory to Mr. Gesell.

Mr. GESELL. I suppose I had better wait and get your memorandum and then try to answer it.

The COURT. You get the memorandum on Monday and then you determine what you want to do. If you want to answer it, then take up with the Court together with counsel the time schedule for filing it.

Mr. GESELL. If your Honor will turn to 1058 for a moment, there are one or two brief comments. I don't want to slow this thing up at all, but there are one or two brief comments on the documents.

Exhibit 1058 pertains to motion picture film, and
3816 if your Honor will refer back to the basic contract between duPont and La Cellophane he will observe that the French reserved all rights to motion picture or sensitized film.

The COURT. Who is Mr. Goetz they are referring to?

Mr. GESELL. I take it he is an associate or partner in the law firm of Rose and Paskus, Mr. Paskus being a director of Du Pont Cellophane, one of the French representatives.

This document pertains not to the subject matter of the contract; this pertains to an independent development that the French are looking toward carrying on in this country for the manufacture of motion picture film to be made by sensitizing plain cellophane, and the question here under discussion is, Who is going to supply the plain cellophane to the company the Germans are going to organize here for the purpose of making this motion picture film? We say we think we would like to have the business and are going to try to price our plain cellophane in such a manner that we can get the business.

Now, as to these other documents, I think a reading of them will support this simple statement as to duPont's position: it was that duPont could not under the contract intentionally sell to buyers who were buying for the purpose, with duPont's knowledge, of exporting into markets from which duPont was forbidden by its
agreements from exporting directly itself. That would be
3817 a violation of the contract. That would be a possible contributory infringement of the patents involved abroad.

There were exports by customers from time to time, but duPont sought not to sell where it knew that its customer was buying with the intent and purpose of exporting.

I would like your Honor to note the next to the last paragraph of Exhibit 1077. There you will get another glimpse of our rela-

tions with Sylvania, which the Government says we were involved in all kind of plots with. You will see the document says that our relations with Sylvania were such that we don't have any information as to where they are selling or what they are doing.

In connection with this same document, your Honor asked what La Cellophane's interest in Australia was. Well, Australia was part of La Cellophane's territory at all times throughout this entire period. It licensed that territory to B. C. L., a company in which it had an interest; but as far as duPont was concerned, Australia was always La Cellophane's territory. I assume that La Cellophane was concerned with Australia because it had licensed that territory to the British company in which it had an interest, and knowing that we were not allowed to sell in Australia under the agreements, it was inquiring how the exports could have taken place.

3818 Mr. TUBRIDY. Your Honor, I have refrained from making comments on Mr. Gesell's comments, but at this time I am afraid I must make a few observations with regard to the facts.

One, there was some argument and dispute as to whether the French or Du Pont would have the rights regarding this sensitized motion picture film. The ultimate conclusion was that Du Pont could manufacture cellophane to be used in the motion picture film industry, but they weren't allowed any rights with regard to the sensitizing of that film.

With regard to 1073, this is the exact thing that Mr. Gesell has mentioned that we are complaining about. In the ordinary trades, the market place, once you have sold an article you cannot have a string on it any longer. A man buys an article and Du Pont says, "You can't sell that any place except where we tell you to sell." It is a restraint in trade.

We would like to turn now, your Honor, to the next group of documents, which are very few in number and are just indicative of what happened when the business came in one particular company's territory and they wouldn't have anything to do with it; they would refer it to the other company's territory.

The COURT. In other words, this is the converse of the type of testimony you have been showing? They were

3819 complaints of intrusion and now this is cooperation and keeping out?

Mr. TUBRIDY. Yes, just a few incidents.

The Government offers in evidence Government's Exhibit 1054, which is a letter addressed to Mr. Jenney dated March 30, 1934, page 1101.

(Letter from Mr. May to Mr. Jenney dated March 30, 1934, was received in evidence and marked "Government's Exhibit No. 1054.")

The COURT. This is from whom?

Mr. TURRIDY. Mr. May, to Mr. Jenney, dated March 30, 1934. It reads:

"I have your letter of March 29th to Mr. Hatt enclosing copy of a letter of March 16th from Mr. P. H. Chase, in which Mr. Chase reports that Mr. Paumier, head of the commercial organization of Rhone-Poulenc, would like information and samples regarding the applications of Cellophane mentioned in an article appearing in the February number of the DuPont magazine.

"Under our agreement with La Cellophane we are confined to definite territories and these territories do not include the Republic of France, which belongs to La Cellophane. Cellulose acetate sheeting and viscose sheeting are in some measure competitive and we would not consider it consistent with our
3820 obligations under the La Cellophane agreement to give to an acetate sheeting manufacturer information that might be useful in competition with viscose sheeting.

"We are already working on a small installation of a cellulose acetate sheeting machine at Waynesboro and when this machine is in operation and the product therefrom has been established commercially, Rhone-Poulenc will be entitled to receive such information as we have in the field of acetate sheeting."

The Government offers in evidence Exhibit 1080, and that consists of three letters, at page 1168.

(Letter to Mr. Ewing, dated February 28, 1931; Memorandum from Mr. Jenney to Mr. Yerkes dated February 26, 1931; and letter from Mr. Butts to the Chairman, E. I. duPont de Nemours & Co., dated 16 February, 1931, were received in evidence and marked "Government's Exhibit No. 1080.")

Mr. TURRIDY. These three letters consist, your Honor, of a letter from an English engineer requesting duPont's assistance in acquiring a plant and converting it, in the production of cellophane in England, and the reply thereto. In his original letter the substance of it is that duPont was prevented from going into the proposition, but it is suggested that the matter be forwarded to Bernheim and, then to I. C. I. if the French were not interested.

The Government offers into evidence Exhibit 1081, appearing at page 1172.

3821 (Letter from Mr. Jenney to Mr. May dated June 2, 1932, was received in evidence and marked "Government's Exhibit No. 1081.")

Mr. TURRIDY. That indicates that duPont arranged for an introduction between people in Turkey and the Capes Viscose people regarding a certain type of bottle cap.

The COURT. Just a moment. I like to get these dates straight because it helps me——

Mr. TUBRIDY. Capes Viscose may be strange to your Honor. That is one of La Cellophane's companies.

The COURT. Proceed, sir.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1082, which exhibit consists of three letters, in which Du Pont refers an inquirer for a South African firm regarding obtaining cellophane to British Cellophane Limited.

(Letter from Mr. Hatt to Mr. Higgins, dated April 7, 1936; Letter from Mr. Hatt to Mr. Buckham, dated April 7, 1936; and Letter from Mr. Buckham to Dupont Cellophane Co., Inc., dated March 31st, 1936, were received in evidence and marked "Government's Exhibit No. 1082.")

Mr. TUBRIDY. The Government offers in evidence Exhibit 1083, in which British Cellophane Limited acknowledges receipt of the aforementioned copies of letters appearing in Government's Exhibit 1082.

(Letter from British Cellophane Limited to Mr. Hatt
3822 dated 16th April, 1936, was received in evidence and marked "Government's Exhibit No. 1083.")

Mr. TUBRIDY. The Government offers in evidence Exhibits 1084, 1085 and 1086, all of which relate to requests by the Amtorg Trading Corporation for best price for machine for making cellophane, and duPont's reply that it had no rights of any kind in Russia under its contract with the French and refers Amtorg to La Cellophane.

(Letter from Amtorg Trading Corporation to Du Pont de Nemours Co., dated June 12, 1939, was received in evidence and marked "Government's Exhibit No. 1084.")

Letter from Mr. Hatt to Foreign Relations Department, Wilmington, re Amtorg Trading Corporation, dated June 19, 1939, was received in evidence and marked "Government's Exhibit No. 1085.")

(Letter from Mr. Jenney to Amtorg Trading Corporation dated June 20, 1939, was received in evidence and marked "Government's Exhibit No. 1086.")

Mr. TUBRIDY. That is all there is in connection with this one, sir.

Mr. GESELL. My only comment to these, your Honor, is that they show that duPont lived up to its agreement. It didn't undertake to manufacture in England or to assist the Russians in manufacturing in Russia. The agreement prohibited that. It
3823 didn't have the rights to do that. From a monopoly point of view—and once in a while we have to come back to the fact that we are trying a monopoly case—the question whether we did or didn't help the Russians build a plant in Russia to manu-

facture cellophane seems somewhaf remote to the monopoly issue that is on trial.

Mr. TUBRIDY. Would your Honor care to take a morning recess?

The COURT. I want some information off the record.

(Discussion off the record.)

(At this point a brief recess was taken.)

* * * * * * *

3832 The Government offers in evidence Exhibit 1402, appearing at page 1813, which is dated December 4, 1928.

The COURT. Are we now going into the category——

Mr. TUBRIDY. We are still on agreements.

The COURT. Still on agreements?

Mr. TUBRIDY. On agreement, because the letter that was attached to the original letter is part of the agreement so far as we can spell out an agreement, and this is a development with regard to that phase of it.

The COURT. Does this fall into the category of interpretation of agreements?

Mr. TUBRIDY. No, sir, it still——

The COURT. You tell me when.

Mr. TUBRIDY. It is with regard to developing the agreement, sir.

The COURT. This is exhibit what?

Mr. TUBRIDY. 1402, sir.

(Letter from Mr. Bernheim to Du Pont Cellophane Co. dated 4 December 1928 was received in evidence and marked Government's Exhibit No. 1402.")

Mr. TUBRIDY. If you will notice, sir, this correspondence has La Cellophane involved in it, La Cellophane Comptoir.

Mr. GESELL. It is written by Comptoir.

Mr. TUBRIDY. Yes. I am just calling his Honor's
3833 attention to the fact that this is not the Kalle and Du Pont but we have Comptoir engaged in the activity with regard to the arrangement of the agreement—the intermediary. As a matter of fact, Comptoir had to tell Du Pont what territory they were licensing. They signed this agreement without knowing what territory they were licensing.

This is a letter dated December 4, 1928, to the Du Pont Cellophane Company, New York. It reads:

"We have received a word yesterday from Kalle & Co. Biebrich, telling us that they have read your proposed Technical Agreement and that they will send you by next mail their own proposals with some slight modifications. Should these modifications be important, we ask you not to sign them before we have exchanged our opinion on them, but we suppose that Kalle & Co. is going to send us copy of their proposals."

The Government offers in evidence Exhibit 1457, appearing at page 1950, sir. This is a letter dated August 16, 1929, from Mr. Yerkes to Mr. Bernheim. It is entitled "Kalle—Du Pont Cellophane Technical Agreement."

(Letter from Mr. Yerkes to Mr. Bernheim dated August 16, 1929, was received in evidence and marked "Government's Exhibit No. 1457.")

Mr. TUBRIDY. It reads as follows:

"With reference to your letter of August 6th, we take it
3834 that it is your understanding that the technical agreement which we will enter into with Kalle & Co. will be similar in all respects to the technical agreement that we have with La Cellophane, and that all of the articles of that proposed agreement will apply to all of the countries coming within Kalle's sector. It is therefore desirable, if the foregoing is in accordance with your understanding, that each of the countries involved in the agreement to be made between Kalle and ourselves, shall be set out in the technical agreement.

"In reference to our cable of August 5th, our patent attorneys had made a request upon Kalle & Co. to apply for certain patents in Germany having to do with the waterproofing process, and Kalle & Co. wrote to us suggesting that these applications also be made in Austria, Poland and Czecho-Slovakia. Not being entirely informed as to the exact countries falling within Kalle's sector, we sent you our cable of August 5th, to which you replied that the three specified countries are within their sector, so we have authorized Kalle to proceed with the applications therein.

"Replying to the last paragraph of your letter of August 6th, we wrote you under date of May 9th sending you a revised technical agreement, for Kalle's approval. You acknowledged this in a letter to us dated May 17th. Since then we have heard absolutely nothing. We have assumed that the negotiations
3835 would be done through you and were really depending on you to get Kalle's approval of the agreement as last submitted, which we understand covers all their criticisms. Won't you be good enough to take this matter up with Kalle and advise us if the revised agreement is satisfactory to them, so that we can have copies drawn up for signature?

"With kindest regards, I am

"Yours very truly,

L. A. YERKES."

The Government offers in evidence Exhibit 1089, appearing at page 1193. This is a letter dated October 4, 1929, from Mr. Pralatowski to Mr. Brown, Confidential Clerk, Buffalo, Subject: Kalle-La Cellophane.

Government's Exhibit 1089

(Letter from Mr. Pralatowski to Mr. Brown dated October 4, 1929, was received in evidence and marked "Government's Exhibit No. 1089.")

Mr. TUBRIDY. It reads:

"We were very much surprised a few weeks ago during a discussion of the filing of foreign applications based on the Cellophane applications by Kalle that they requested a number of countries in addition to Germany, because we had thought that they were the licensees of La Cellophane for Germany only.

"That particular case was settled by an exchange of cables between Mr. Bernheim and ourselves in which he stated that he was agreeable to Kalle filing these in Germany, Austria, Czechoslovakia and Poland.

3836 "In a letter relating to some additional foreign applications, Kalle has definitely indicated that the countries in their territory are Austria, Hungary, Norway, Sweden, Denmark, Finland, Poland, Czechoslovakia, Russia, Estonia, Latvia and Lithuania. We think it worth your while to make a note of these countries on the agreement between Du Pont Cellophane and Kalle, which has recently been executed because a knowledge of the countries in which Kalle is a licensee of La Cellophane may be a matter of some importance to us at a later time and a matter which might be difficult to determine."

The Government offers in evidence Exhibit 1090, letter dated October 22, 1929, from Mr. Hess to Mr. Pralatowski.

(Letter from Mr. Hess to Mr. Pralatowski, dated October 22nd, 1929, was received in evidence and marked "Government's Exhibit No. 1090.")

Mr. TUBRIDY. It reads:

"Thanks for your letter of October 15th sending me copy of your letter of the 4th instant to Mr. Brown, in regard to names of countries for which Kalle & Company are licensees under their agreement with La Cellophane.

"As mentioned to you in person here on Friday last, apparently the exact list of countries for which Kalle & Company have licenses is not definitely known by us, and Vice-President

3837 C. M. Albright is still in correspondence with La Cellophane in order to arrive at a definite understanding in this connection. When the latter has been reached, we shall see that you and Mr. Brown are duly advised."

Mr. TUBRIDY. I will let Mr. Gesell comment in connection with those, if he pleases.

Mr. GESELL. Your Honor, I would like to refer back to Government's Exhibit 1092 at page 996. That, your Honor will

recall, was the technical agreement between DuPont Cellophane and Arena, one of the basic agreements entered into at the time shortly after Du Pont Cellophane Company was organized. And if your Honor will direct his attention to the sixth paragraph on the 1,000th page, you will see the contractual undertaking which Du Pont Cellophane Company took in this agreement.

That provision obligated Du Pont Cellophane to license any licensee of La Cellophane in La Cellophane's licensed territory. And all that this Kalle agreement is is carrying out the terms of this basic technical agreement. Kalle had become a licensee of La Cellophane, and when Kalle became a licensee of La Cellophane in a portion of the world where La Cellophane was, part of its territory, we became obligated under this technical agreement to license Kalle. And we did.

3838 I think it is clear from the comments we had on Government Exhibit 1087 that there is a misconception of this situation on the Government's side. Mr. Tubridy read the reference to "for obvious reasons," clearly, I suppose, by his emphasis intending to have your Honor feel that the reference to the specific territories was omitted from the agreement because of some sinister anti-trust reason. Well, it is clear from the correspondence first of all that the territories were not mentioned in the agreement because duPont didn't know what they were. Exhibit 1091 shows that the first we heard of the territories came from La Cellophane after the agreement had been signed. Well, that would be an obvious reason for not putting them in, and it is not a reason of any anti-trust significance. It was not a matter of DuPont Cellophane's concern what the territories were. Our arrangement was with La Cellophane, Exhibit 1002, and if La Cellophane undertook to license a portion of its territory to some one else, as was contemplated by the agreement, the matter of determining what those territories were was a matter for La Cellophane to determine, not for us. Our only concern was that La Cellophane not license Kalle in any manner inconsistent with the basic agreement we had with La Cellophane, Exhibit 1002; and, accordingly, we said that we assumed that the same license provisions would be maintained, but this is not La Cellophane acting as an in-

3839 termediary, which is a phrase that we have had frequently from the Government's side. We are dealing with La Cellophane, because La Cellophane is the licensor licensing Kalle, and we are simply carrying out the commitments we have to pass to Kalle, for whatever territory La Cellophane determines shall be Kalle's, rights in the inventions involved.

You will see frequent references to the fact that Kalle is a licensee of La Cellophane, thus emphasizing the very thing that I have been saying. In Exhibit 1089, which was one of those

read, Kalle is a licensee of La Cellophane. Exhibit 1090 refers to Kalle, licensees under their agreement with La Cellophane. All this document did, which started off this group, the contract that is Exhibit 1087, was to impliment the sixth provision of the basic contract, Exhibit 1002.

The COURT. Proceed, sir.

Mr. TURRIDY. I just want to make one little observation, sir, in connection with that. No place in paragraph 6 does it say it shall be a direct license agreement between Kalle and duPont. Is that entered into pursuant to their contractual rights? It is not particularly pertinent or material. I just wanted to address that comment to Mr. Gesell's argument.

With regard to the next group of documents, your Honor, we try to show an interpretation of the agreement and how the
3840 agreement was carried out, and that involves three sets.

The first deals with regard to the right to sublicense, which might come under the heading probably of the interpretation of the agreement.

The Government offers in evidence Exhibit 1092, appearing at page 1197.

(The letter from L. A. Yerkes to Kalle & Company, dated May 12, 1939, was received in evidence and marked "Government's Exhibit No. 1092.")

Mr. TURRIDY. This is dated May 12, 1939, and signed by Mr. Yerkes, addressed to Kalle & Company, entitled "Cellophane Cellulose Film Agreement, May 7, 1929."

"Until very recently it has been assumed that the rights of the parties in their respective territories under patents of the other party have included freedom to grant sub-licenses to others under such patents where the occasion justified the granting of such sub-licenses.

"We believe it well to clarify this agreement in this respect and so we ask that you confirm our original understanding by indicating your assent below that each party can, at its discretion, sub-license others in its territory, within the scope of the agreement, under exclusive license covering patents originating with the other party."

The Government offers in evidence Exhibit 1093, appearing at page 1198.

3841 (The letter from Walter Mauss to E. I. duPont de Nemours & Company dated June 30, 1939, was received in evidence and marked "Government's Exhibit No. 1093.")

Mr. TURRIDY. This is dated June 30, 1939, signed by Walter Mauss, addressed to E. I. duPont de Nemours & Company. It states:

"With reference to the conference which we had with your Mr. Sparre on Friday, June 16 of this year in the office building of the I. G. in Frankfort-on-the-Main, we transmit to you the attached signed declaration by which we formally agree that the reciprocally granted licenses in the above mentioned working agreement are to be considered as transferable. We request only that in the eventual granting of sublicenses, care should be taken that the division of sectors of the primary agreement, also be strictly observed by the sublicensees."

The Government offers in evidence Exhibit 1094.

(The letter from B. M. May to Mr. W. F. Raskob, dated July 1, 1940 was received in evidence and marked "Government's Exhibit No. 1094.")

Mr. TUBRIDY. This is a document signed by Mr. DeRight for Mr. May, addressed to Mr. Raskob, dated July 1, 1940. It states:

"Cellulose Firm Agreement—Kalle & Company, A. G.

"We send you for filing with the agreement between
3842 Du Pont Cellophane Company and Kalle & Company, A. G. dated May 7, 1929, the duplicate original of a letter from Mr. Yerkes, General Manager of the Rayon Department, to Kalle, dated May 12, 1939, clarifying the right of both parties to license others in their own territory under patents based upon inventions originating with the other party. This letter is endorsed as accepted by Kalle under date of May 12, 1939.

"Copies of Mr. Yerkes' letter are being sent to the indicated recipients of this letter.

"Please acknowledge receipt of this document on the attached extra copy of this letter."

The Government offers in evidence Exhibit 1095, appearing at page 1200. There is a covering letter on top.

(The letter from Mr. Albright to Kalle & Company dated February 16, 1932, was received in evidence and marked "Government's Exhibit No. 1095.")

Mr. TUBRIDY. The covering letter has a notation on top. The covering notation says, "Some minor changes have been made in Mr. Albright's letter as written on February 12th, and the attached is being mailed to Kalle today. Will you, therefore, kindly return copy of previous letter to: L. M. Kriegel, New York Office."

The letter is dated February 16, 1932, from Mr. Albright to Kalle & Company.

"Gentlemen:

3843 "Subject: License Agreement—Czecho-Slovakian Patent No. 36,025.

"We have given due consideration to the proposals made in your letter to us of December 8th, 1931, and are pleased to inform you

that it will be satisfactory to us to grant you an implied license under this patent without further formalities.

"We should like to explain, however, that in offering you an exclusive license covering patent No. 36,425 we were simply following the established practise between La Cellophane and Du Pont Cellophane Company, Inc. In fact, we assumed that you preferred a separate license agreement in order that you could become the licensee of record, which is quite necessary in some countries, such as Belgium and France, where this formality is necessary since only a licensee or assignee of record can legally work the patent or pay taxes as required by law. We understand from your letter that this is not a requirement for the territory of Czecho-Slovakia.

"With respect to foreign application for our territory in which we are interested, we prefer an assignment and prosecute the application ourselves. In case the invention is broader than the basic agreement, an exclusive license for our territory is the acceptable form.

"You agree to work the patent to the extent of making
3844 small quantities of Moistureproof Cellophane in Czecho-Slovakia, and you guarantee to do everything that you would do if it were your own patent in that country, all of which we believe is within the spirit of our general agreement. We understand that you cannot give any guarantee that this will legally maintain the patent for that country, and since your interests are obviously greater than ours, we can see no reason for not accepting your proposals as satisfactory. We would request, however, in case you decide to abandon the patent for either nonpayment of taxes or nonworking, as indicated above, that you advise us to this effect, pursuant to the terms of our agreement.

"With reference to the question of high taxes for the small countries in your territory, regarding which you point out it could well be that it would no longer be economical for you to operate or maintain the patent, we believe that our general agreement protects you on this point. Obviously we could not expect you to perpetuate the patent if you find it unprofitable to do so, but for purposes of record we should know that you intend to discontinue the taxes.

"With respect to the return of the rights granted under our patents, we can have no objections to your giving a license to your associates for your territory, provided you place on them the same restrictions as imposed on you. The clause in our proposed
3845 license agreement was similar to that contained in our basic agreement, namely, to protect us against the rights under a patent getting into the hands of a third party who could manufac-

ture the product under the patent and sell in competition with us in our territory. Since we have agreed to grant you an implied license, there is really no need for discussing this subject further except in the way of an explanation in response to your specific question on this point.

"We believe this will answer the various questions which you have raised; if not, will you please advise."

3846 The COURT. Mr. Tubridy, yesterday I made inquiry about the use of the words "implied license." Is that a term of art or is it just applicable to this situation we have here?

Mr. TUBRIDY. I think it is applicable to this type of situation, where the patent, as I understand it, sir, is registered, say, in Du Pont's name and they let Kalle work it or use it with the understanding that nothing will happen in connection with them for working that patent which is registered in Du Pont's name.

The COURT. What I am after is this: Is that a method of doing business with Europeans in general; or is that just characteristic of the relationship between the defendant here and the parties in Europe?

Mr. TUBRIDY. I don't know, sir.

The COURT. I see.

Mr. GESELL. If your Honor pleases, my understanding is it is done both abroad and here. It is a word of art, an implied license, frequently found mentioned in the cases.

Mr. MINICUS. I challenge that contention, your Honor. There is such a thing as an implied license. Of course, when you sell a person abroad that you have a patent on, there is an implied license to use that product, but in this case we have no evidence in the record as yet even what patents are being based on or what kind of licenses these are. They seem to be bare naked agreements.

3847 The COURT. What I was after by my inquiry was this. Was this an orthodox method of doing business with Europeans, that you can have an implied license? Mr. Gesell says yes, it is done not only there but it is done in this country.

Mr. MINICUS. We don't even believe that these broad basic agreements are actually licenses. If they are, we cannot find the subject matter of the license. It is not our contention that they are licenses, your Honor, but they are agreements dividing world territories.

Mr. GESELL. You mean that there were no patents and no technical information passing under these agreements? Is that the position of the Government?

Mr. MINICUS. There has been no evidence of what patents are involved in this case so far, the nature of the patents or the validity of the patents. We do know that when we started this trial the

patents existing at that time were declared to be worthless by duPont. Now, what patents have been developed in the meantime we do not know, as the record stands at the present time.

Mr. GESELL. If your Honor please, that doesn't answer the question I posed. Is it the Government's contention that there were not patents and technical information licensed under these agreements?

Mr. TUBRIDY. We are coming to that, sir; there are.

3848 Mr. GESELL. I want an answer to that issue, because I think it will focus attention on what we have been going through these past few days.

Mr. TUBRIDY. If I may get a word in, I was coming to that now.

The COURT. You may take ten minutes.

Mr. TUBRIDY. I am ready to show that these patents did go to Kalle & Company. That is what is coming in.

Mr. GESELL. That is what I thought; the patents were licensed.

Mr. TUBRIDY. I think there is a bit of misunderstanding in connection with this.

Mr. GESELL. Mr. Minicus, however, is saying they weren't. I think we ought to know which the position is.

Mr. TUBRIDY. I think in connection with that it is this: I think this is Mr. Minicus' point. Maybe I am wrong, but if I can clarify the situation I will be delighted to——

The COURT. Well, it started out as a very simple inquiry on my part.

Mr. GESELL. You notice how your inquiries help to clarify it.

The COURT. Go on.

Mr. TUBRIDY. What this is, your Honor, is that the licenses, the assignments are not precisely what the arrangements are be-

3849 tween the parties. When they give an assignment or implied license to Kalle & Company, on its face it looks as though Kalle & Company has got this. Actually by gentleman's agreement they have only got this.

Mr. GESELL. But it is agreed then that patents and technical information were licensed under these agreements?

Mr. TUBRIDY. Our point is—I think the point is being developed much bigger than it really is in any way or in any connection. I merely tried to point out how the disagreement arose, which is always difficult to do. But I think we can go on. I think this matter will straighten itself out with regard to actual patent information going to Kalle & Company and there being licensed under the patents.

The COURT. Proceed.

Mr. TUBRIDY. Government's Exhibit 1096 is offered in evidence. It is at page 1203. This is a letter from Mr. Hess to Mr. Albright.

titled "Advice of Action." The subject is, "Cellophane Technical Agreement with Kalle & Company—Czechoslovakian Moistureproof Cellophane Patent." It is the action taken by the Executive Committee at the meeting of February 10, 1932.

Government's Exhibit 1096

(Letter from Mr. Hess to Mr. Albright dated February 11, 1932, was received in evidence and marked "Government's Exhibit No. 1096.")

Mr. TUBRIDY. It reads:

"Remarks:

3850 "Referring to your letter of February 5th (#1289) in regard to license executed by our Company, under date of August 7, 1931, granting to Kalle & Company, our German Associates, pursuant to our arrangement for the inter-change of technical information, patents, etc., exclusive rights for Czechoslovakia in the manufacture, use and sale of invention described in Czechoslovakian Patent No. 36025, issued January 15, 1930, corresponding to our Parent U. S. Moistureproof Cellophane Patent No. 1,737,167, issued November 26, 1929, covering sheet of coated Cellophane (excluding right to use the invention for sensitizing or other treatment of the film base for photographic or other use),—

"Kalle have requested that we consider our position in suggesting a specific license in this case, pointing out some objectionable features to which they could not agree, and suggesting that, so long as they do everything contemplated in the original basic Technical Agreement, would it not be sufficient to simply give them an implied license with respect to their territory.

"After due consideration of the various points involved, it was unanimously decided that it would be satisfactory to grant Kalle an implied license in this case. Your letter, above referred to, was ordered filed, it being understood that you will reply to Kalle accordingly."

The Government offers in evidence Exhibit 1097, dated June 1, 1932, from Mr. Hess to Mr. Pralatowski, titled

3851 "Assignment to Kalle & Company Covering German Rights Corresponding to our U. S. Application (Herndon) Re Coating of Drier Rolls."

(Memorandum from Mr. Hess to Mr. Pralatowski dated June 1, 1932, was received in evidence and marked "Government's Exhibit No. 1097.")

Mr. TUBRIDY. It reads:

"You sent me a copy of your letter of March 17th to J. L. Seymour, Wilmington Legal Department, asking that he prepare

papers covering assignment to Kalle, at their request, covering rights in Austria, Czecho-Slovakia, Germany, and Poland, relating to the above mentioned invention; we also received copy of your telegram of March 24th to Mr. Seymour, stating that Kalle only wants those rights for Germany.

"In your letter you stated that the convention date expires May 27, 1932.

"We have not heard anything further at this end, and are wondering if the matter was handled in due time by signatures of the inventor, without the necessity of any formal paper execution by the Company."

The Government offers in evidence Exhibit 1098 appearing at page 1205, a letter from Mr. Hess to Mr. Pralatowski dated March 17, 1933.)

(Letter from Mr. Hess to Mr. Pralatowski dated March 17, 1933, was received in evidence and marked Govern-
3852 ment's Exhibit No. 1098.")

Mr. TUBRIDY. That reads:

"Proposed License to Kalle & Company Covering Danish Patent No. 46,957, Issued February 8, 1933, Corresponding to our U. S. Patent No. 1,737,187, Issued November 26, 1929, our Parent U. S. Patent Covering Moistureproof Cellophane:

"Your letter of March 13th to Mr. Pritchard suggested issuance of a license to Kalle covering the above mentioned Danish patent, along the lines of the license for the corresponding French patent to La Cellophane.

"May I remind you that we executed a license, under date of August 7, 1931, to Kalle covering corresponding Czechoslovakian patent. Kalle did not execute this license, so far as I know. They requested that we reconsider our position in suggesting a specific license, pointing out some objectionable features to which they could not agree, and suggested that, so long as they did everything contemplated in the original basic Technical Agreement, would it not be sufficient to simply give them an implied license with respect to their territory.

"At our Executive Committee meeting held on February 10, 1932, (see your copy of Advice of Action to Mr. Albright, dated February 11, 1932), it was unanimously decided that it would be satisfactory to grant Kalle an implied license in this case,
3853 i. e. the Czechoslovakian patent No. 36,025, issued January 15, 1930. It was understood Mr. Albright replied to Kalle accordingly. (Reply 2/16/32, N. Y., File—Technical Agreements.)

"The objections on Kalle's part to a specific license from us may be restricted to Czechoslovakia because of special requirements

therein, and then again they may be satisfied with an implied license in other countries within their territory. Before proceeding further with the proposed license covering the Danish patent, therefore, I suggest you consult with Mr. Albright in view of correspondence he had with Kalle at the time of the situation surrounding the proposed license covering the Czechoslovakian patent in this connection."

The COURT. Now, without starting a chain reaction, may I ask another question. In an implied license does duPont get paid a royalty?

Mr. TUBRIDY. Well, these are supposed to be free, free interchange.

The COURT. That is what I want to know. In other words, what I was after, was there any additional consideration passing from one party to another when we come across a situation involving an implied license?

Mr. TUBRIDY. Apparently not, sir.

The Government offers in evidence Exhibit 1099, docu-
3854 ment dated March 20, 1933, to Kalle & Company from Mr. Pralatowski.

(Letter from Mr. Pralatowski to Kalle & Company dated March 20, 1933, was received in evidence and marked "Government's Exhibit No. 1099.")

Mr. TUBRIDY. It states:

"We are pleased to inform you that Danish Patent 46,957 has issued on an application corresponding to Charch and Prindle, U. S. 1,737,187, for the parent moistureproofing invention.

"This patent issued on an application filed after the expiration of the convention period and after the publication of French Patent 647,330 on November 22, 1928 for the same invention. The patent, therefore, may not be entirely valid and may have only a nuisance value.

"The patent stands assigned to the Du Pont Cellophane Company, but since Denmark is one of your countries, you have an implied license thereunder. If you should desire a specific license, please advise us.

"We would be pleased to have your views as to the value of the patent and as to whether or not you will exercise your implied license and endeavor to maintain the patent.

"Truly yours, F. M. Pralatowski, Director of Patents.

"P. S. Mr. Hess is correct in pointing out that Kalle does
not desire a specific license in cases such as this. It is
3855 true that Mr. Albright's letter of February 16, 1932 is quite restricted to Czecho-Slovakia. On the other hand, Kalle's letter of December 8, 1931, which prompted the discussion, is gen-

eral as to all countries where the patent issues in the name of Du Pont Cellophane. We completely overlooked the special treatment of the early cases."

The Government offers in evidence Exhibit 1100 at page 1208. This is a letter to Kalle & Company from Mr. Hatt dated May 24, 1933, captioned, "Moistureproof Cellophane Patent—United States."

Government's Exhibit 1100

(Letter from Mr. Hatt to Kalle & Company, dated May 24, 1933, was received in evidence and marked "Government's Exhibit No. 1100.")

Mr. TUBRIDY: It reads:

"We think you will be interested to know that we have just concluded an arrangement with the Sylvania Industrial Corporation here, whereby they took a license for the manufacture and sale in the United States, its territories and possessions, under the Du Pont Moistureproof Cellophane patents, which will permit them to produce a sheet of regenerated cellulose to which has been applied a moisture-proofing composition.

"This comes as a result of our suit against them for infringement of these patents, and in the agreement entered into,
3856 they acknowledge the validity of the patents and they agree to pay a royalty of two percent of their gross sales of all moistureproof material sold and to accept a limitation as to the total quantity which they may sell in any year during the life of these patents.

"For the current year, this is not to exceed twenty percent. At their present rate of business, they are not selling in excess of ten percent of our combined sales and they are not guaranteed any fixed percentage of the total joint sales of moistureproof material.

"There has been no arrangement made whatever, for the exchange of technical information or 'know how' and nothing that savors of an agreement along other lines of business.

"We thought you would be interested in this as a matter of information, and for your records, and beg to remain

"Very truly yours,

J. E. HATT."

The Government offers in evidence Exhibit 1101, page 1209. This is a letter from Mr. Hatt to Mr. Hess dated May 22, 1933.

(Letter from Mr. Hatt to Mr. Hess dated May 22, 1933, was received in evidence and marked "Government's Exhibit No. 1101.")

Mr. TUBRIDY. It states:

"The attached copy of letter from Mr. Paralatowski
3857 to Mr. Gladding will be of interest to the Executives in

connection with the recent correspondence from the London Office, advising the comments of Messrs. Ewing and Jenney on their visit with the officials of Kalle on this subject."

Mr. GESELL. Aren't you going to read the footnote which explains the prior letter?

Mr. TUBRIDY. "Mr. Yerkes—Do you think Kalle should be informed of our settlement with Sylvania? In view of our technical agreement, think it would be a good thing to do."

The Government offers in evidence Exhibit 1102, appearing at page 1210, a memorandum from Mr. Pralatowski dated April 27, 1934.

Government's Exhibit 1102

(Memorandum of Mr. Pralatowski dated April 27, 1934, was received in evidence and marked "Government's Exhibit No. 1102.")

Mr. TUBRIDY. It reads:

"Memorandum. Review of the Du Pont-Kalle Relations.

"In view of Kalle's recent request that we assign all applications now standing in the name of Du Pont to them in order that they may continue to use their regular patent attorneys, it seems important to consider generally the history of this Du Pont-Kalle relation so that any decision we take at this time will
3858 be based on the precedent that has been set up or will at least be taken with an appreciation of those precedents.

"We started out in the summer of 1929 to send to Kalle copies of our applications which came under the agreement that had not yet been signed. The practice was for them to file in their countries in our name, and we intended when the patents issued to give them a proper license.

"It should be noted that before we took up our contacts with Kalle, we had already filed the Charch and Prindle application in a good many European countries including those of the Kalle territory. From October, 1929 to about April, 1930 there was a discussion based on Kalle's request to take over the prosecution of the German Charch and Prindle application. We opposed this idea, but finally told our German lawyer to work closely with Kalle, but to take instructions from us. This situation is explained in Mr. May's letter to Mr. Bernheim of April 10, 1930 and Mr. Hatt's letter to Kalle of April 15, 1930.

"By April 10, 1931 certain patents, depending on Du Pont inventions which had been filed by Kalle, had issued and I opened up the discussion of giving to Kalle the licenses which were their due. Specifically, there had issued three Polish patents for the anchored gelatin invention, for the Charch and Craigue method and apparatus for moistureproofing and for the two-stage

3859 coating invention. A little later, the Czecho-Slovakian patent for the Charch and Prindle invention issued. This patent, of course, had been prosecuted by the Du Pont Cellophane Company on an application filed before there was any Kalle agreement. The matter can be better discussed in terms of this Czecho-Slovakian patent because the correspondence is more complete in regard thereto.

"On August 7, 1931 the executives of the Company executed a license transmitting to Kalle that fraction of the Charch and Prindle Czecho-Slovakian patent which was their due in accordance with the agreement.

"On December 8, 1931 Kalle wrote to us and indicated that they did not want a specific license, but they were content to have an implied license under the general agreement. Particularly, they wanted an implied license to be fairly elastic so they could summarily abandon the invention, or not continue to pay taxes, or not work it, or even so that they could license it to a third party.

3860 "On February 16, 1932 Mr. Albright wrote to Kalle and generally agreed with them in regard to an implied license. Thereafter, we did not attempt to draft specific licenses for any patents which issued on Du Pont inventions and which applications had been prosecuted by Kalle. We merely let it be understood that they had an implied license for the subject matter of the agreement.

"About this time there was a general discussion which related to the Comptoir and to La Cellophane, as well as to Kalle, in regard to assignments versus licenses. This is reflected in the Advice of Action of February 11, 1932 in which we were instructed generally to transmit our inventions to our foreign associates by means of an assignment instead of a license unless there was some overpowering reason to hold back deliberately some portion of the invention. This action was taken for a number of reasons, among which were:

"(1) In the case of France, if an issued patent is assigned, the person taking the assignment must instantly pay the taxes for the life of the patent and this was not to the liking of the French.

"(2) The French had to be licensees of record in order to perpetuate the patent by making the workings and paying the taxes, and the cost of recording the license was a factor.

"(3) The French had taken the position that as long as 3861 they were only licensees, they did not feel at liberty to prosecute these foreign applications themselves, but depended upon us. At this time the Company was desirous of getting out of foreign patents and we saw a chance to save a con-

siderable amount of money by not having to concern ourselves with the prosecution of these foreign cases.

"(4) Many of the inventions being transmitted to the associates were not larger than the subject matter of the agreement and an assignment would be more in strict accord with the agreement than a license. For the few inventions which might be larger than the agreement, there was frequently no other commitment at the moment and it was thought that the most expeditious administration of these agreements would be to assign the inventions to the associates with the understanding that there was an implied license back to us for the fraction of the invention not covered by the agreement.

"(5) Our foreign associates, particularly the Comptoir and La Cellophane, had been generally assigning their inventions to us with more or less disregard of the breadth of the inventions with respect to the breadth of the agreement.

"In view of this Advice of the Executive Committee, we thereupon instituted the practice of assigning inventions to the foreign associates so that the patents have since issued in their names.

"The net result is that today there are in Germany 3862 patents and patent applications depending on Du Pont inventions, some of which cases stand in the name of Kalle. It appears true that those standing in the name of Kalle are more in accord with our prevailing policy. It seems logical that they all ought to be either in the name of Kalle in accordance with our present trend, or all ought to be transferred back in the name of Du Pont. Kalle wishes to have them all stand in their name so that they can continue to use their customary lawyers and not run afoul of some new German legislation."

The Government offers in evidence Exhibit 1103, appearing at page 1213.

Government's Exhibit 1103

(The letter from the General Manager, Cellophane Division of E. I. du Pont de Nemours & Company to Kalle & Company dated July 2, 1936, was received in evidence and marked "Government's Exhibit No. 1103.")

Mr. TURRENTY. This is a letter from the General Manager of the Cellophane Division of E. I. duPont de Nemours & Company to Kalle, dated July 2, 1936. The letter states:

"This is to advise you that Du Pont Cellophane Company, Inc. was dissolved on June 30, 1936 and its assets and business are now owned and operated by E. I. duPont de Nemours & Company. Your agreement dated May 7, 1929 with Du Pont Cellophane Company, Inc. will be assumed and performed by E. I. duPont de Nemours & Company.

3863 "The executive offices will, for the present, be maintained in the same location as heretofore. All correspondence should be handled as in the past, except that it should be addressed to E. I. du Pont de Nemours & Company, 'Cellophane' Division rather than to Du Pont Cellophane Company, Inc.

"The business will be administered by the same personnel as in the past and the policies of the former company will be continued."

The Government offers in evidence Exhibit 1104, appearing at page 1214.

(The letter from W. W. Smith to Mr. C. M. Albright, dated February 14, 1935, was received in evidence and marked "Government's Exhibit No. 1104.")

Mr. TURBRIDY. This is a letter from Mr. W. W. Smith to Mr. Albright, dated February 14, 1935:

"We are handing to you herewith the original license agreement between Kalle & Co., Aktiengesellschaft and Du Pont Cellophane Company, Inc. which was executed November 15, 1933 in connection with U. S. Patent No. 1,917,646 which issued July 11, 1933 in the name of Herrmann as assigned to Kalle. This patent covers the preparation of viscose, where cellulose xanthate is dissolved and aged in alkali solution in the presence of oxygen under pressure.

3864 "Inasmuch as the above invention is broader than the agreement existing between the two companies, the above license comes to us for that portion of the invention which falls under the scope of the agreement."

Attached thereto is a copy of the agreement referred to.

The Government offers in evidence Exhibit 1105, appearing at page 1219, which is a license from Kalle & Company dated January 31, 1936, to DuPont Cellophane Company, under a patent that relates to a process for treating regenerated cellulose articles.

The COURT. That is a license from Du Pont to Kalle?

Mr. TURBRIDY. It is from Kalle to Du Pont, sir. It states:

"Whereas, Kalle is the owner of the entire right, title and interest to the invention * * *" it is Kalle to Du Pont, sir.

(The license agreement from Kalle & Company to Du Pont, dated January 31, 1936, was received in evidence and marked "Government's Exhibit No. 1105.")

The COURT. What is the date of that?

Mr. TURBRIDY. January 31, 1936.

The Government offers in evidence Exhibit 1106, appearing at page 1223, which is a patent relating to the method of packaging and is assigned by du Pont to Kalle.

3865 (The assignment of the method of packaging by duPont to Kalle, dated February 1, 1939, was received in evidence and marked "Government's Exhibit No. 1106.")

Mr. Tubridy. The Government offers in evidence Exhibit 1107, appearing at page 1226, dated March 9, 1940, from Kalle & Company to Duco, A. G., Lackfabrik, Berlin-Kopenick, Spindlersfeld, German Patent Application P. 67,363 IVc/22 H (345 AI) relating to Moisture proofing Coating Lacquers.

(The letter from Kalle & Company to Duco, A. G., dated March 9 1940, was received in evidence and marked "Government's Exhibit No. 1107.")

Mr. Tubridy (reading): "We are informed by the duPont Patent Section that you wish to lodge opposition to the above-noted patent application which we have taken over from duPont. We assume that this intention is explained by the fact that you do not fully understand that rights under this application are granted to us by duPont only for the regenerated cellulose species. We are, therefore, ready, according to duPont's telegraphed suggestion, to grant you in connection with this application a royalty-free license insofar as the lacquers of this application are applied to paper. We hope that this royalty-free license meets with your approval, and that you will, therefore, withdraw your opposition.

"Very truly yours,

3866 "KALLE & Co. AKTIENGESELLSCHAFT."

The Government offers in evidence Exhibit 1108, from Mr. Prentiss to Mr. Raskob, dated July 23, 1940, titled "German Patent Application P. 67,363 IVc/22 (345 A') Relating to Moisturefroofing Coating Lacquers."

(The letter from S. S., Prentiss to W. F. Raskob, dated July 23, 1940, was received in evidence and marked "Government's Exhibit No. 1108.")

Mr. Tubridy. (Reading.) "The above-noted German patent application was assigned to the books of E. I. duPont de Nemours & Co. in the assignment of July 1, 1936. This patent application stands nominally in Kalle's name, with the tacit understanding that the du Pont Company retains rights in the invention outside of the field of Kalle's interest. Our associate, German Duco, was desirous of obtaining rights under this German application for the coating of paper, a field in which Kalle is not interested. We would call your attention to the translations of letters attached wherein Kalle, at our request, grants Duco an exclusive, royalty-free license under this patent application insofar as it relates to the coating of paper."

The Government offers in evidence Exhibit 2083, appearing at page 2173.

(The letter from W. W. Smith to F. G. Hess, dated May 26, 1936, was received in evidence and marked "Government's
3867 Exhibit No. 2083.)

The Court. Recess until 2:15 o'clock.

(At this point a recess was taken until 2:15 o'clock p. m., the same day.)

3868 2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. TURNBULL. The Government has offered in evidence Exhibit 2083, sir, which is at page 2173. That is a letter from Smith to Hess, dated May 26, 1936, captioned "Abandonment of German Application I–128,587 (Corresponding to Collins U. S. Serial No. 586,249)." It reads as follows:

"Our Collins application referred to above relates to moisture-proofing compositions comprising a wax and rubber or a rubber derivative. The U. S. application is at present involved in interference with a Shankweiler application of Hercules and the settlement of this interference has been the subject of considerable discussion and negotiation.

"Kalle & Company filed in Germany a corresponding patent application which has been rejected by the German Patent Office. The same general arguments for rejection were advanced as appeared in the rejection of the original Charch and Prindle application in Germany. Kalle & Company advises that in view of the rejection of the original Charch and Prindle, a patent granted on the Collins application would have no practical value to them. Accordingly, they wish to withdraw the application and ask for our consent to this procedure.

3869 "Apparently, the German Patent Office has taken a very arbitrary position with respect to these cases which relate to moistureproofing coating compositions. Our attempt to argue the original Charch and Prindle German application met with no success and it is therefore reasonable to believe that attempts to secure these other improvement cases would be just as unsuccessful in view of the general attitude of the German Patent Office towards such inventions. We can see no reason for our wishing to carry on the prosecution of this application in Germany at our expense and inasmuch as Kalle feels that it is advisable to withdraw the case, we believe that permission should be extended to them to do so.

"We shall appreciate your advices in this matter at your early convenience so that we can inform Kalle accordingly."

The Government offers in evidence Exhibit 2084 appearing at page 2174. That is a letter from Mr. Hess to Mr. Smith dated June 1, 1936.

(Letter from Mr. Hess to Mr. Smith dated June 1, 1936, was received in evidence and marked "Government's Exhibit No. 2084.")

Mr. TUBRIDY. This is again regarding "Abandonment of German Patent Application K-128,587, Corresponding to our Collins U. S. Patent Application, Serial No. 586,249, Filed January 12, 1932." It reads:

3870 "Referring to your letter of May 26th concerning the above mentioned German patent application, which relates to moistureproofing compositions comprising a wax and rubber or a rubber derivative, the President has authorized, with the approval of Mr. Hatt, that permission be granted to Kalle & Company to abandon this application.

"This is in view of the fact that Kalle are not interested in prosecuting the matter further because of the attitude prevailing in the German Patent Office with regard to this type of invention and since we are not desirous of pursuing it on our own account."

The last document in this group which I wish to offer is Government's Exhibit 2093 appearing at page 2203, that is a letter dated November 2, 1942, from Mr. Daley to Mr. Slagen, Patent Division, Re: Muller & Herrmann Patent No. 2,252,091.

(Letter from Mr. Daley to Mr. Slagen dated November 2, 1942, was received in evidence and marked "Government's Exhibit No. 2093.")

Mr. TUBRIDY. It reads as follows:

"I have offered Sylvania a license under the above noted patent in accordance with our moistureproofing agreement, subject to our obtaining Government permission to execute the license.

"We obtained this patent in accordance with our Kalle
2871 technical agreement. If your feel that it is necessary for us to obtain Government approval to execute the agreement granting the license to Sylvania, please proceed to petition for the desired Government license.

"I have drafted the agreement licensing Sylvania and will provide you with whatever copies you need, at your request."

3872 The COURT. Could I just glance at that last writing? My copy is not too clear.

Mr. TUBRIDY. Yes, sir. I am sorry, I should have had another one made up.

The COURT. That is all right.

Mr. TUBRIDY. That concludes that group.

The COURT. That is under the category of "Interpretation of Agreements"?

Mr. TUBRIDY. Yes, sir, that completes the Kalle group, sir.

Mr. GESELL. Your Honor, my comments will be very brief.

This group of documents simply discloses an undisputed fact that duPont lived up to its contract. Patents were licensed in accordance with the provisions of the contract. What I would like to emphasize is the care with which these various licenses were executed in strict accordance with the technical requirements of the agreement and the technical field of the agreement, and I think as good an example as any is Exhibit 1107 in this group. You will see there that the German patent was involved relating to moistureproofing coating lacquer. duPont had a company in Germany called Duco, A. G. which was interested in this lacquer for non-cellophane purposes, and it had an application to Kalle under the technical agreement to license Kalle in the cello-
3873 phane field. So you see that the license with care was executed so that Kalle got rights under the patent only for the specific field of the technical licensing agreement, and rights outside of the field were preserved for Duco, A. G.; and there are many other examples of that same situation through the documents.

To turn to Exhibit 1104, you will see it reflected in the formal license agreements themselves. Here was a license agreement between Kalle and Du Pont Cellophane, and at page 1216 of the agreement you will see that the invention there was licensed both under paragraph 1 and paragraph 2, limited specifically to the production of cellulose hydrate in sheet form or for use in the production of cellulose hydrate in sheet or ribbon form.

All of these documents, as I read them, disclose that same technical preciseness in the execution of the implementing licenses.

I think also these documents will show clearly that the conduct was open, normal business conduct. You will see again and again and again that these documents were sent to the duPont Legal Division, to its outside counsel, reviewed and carried out in a normal way under the technical agreement.

My other comment relates to a different subject and arises from Exhibit 1100 at Page 1208. Here is a document written by Mr. Hatt to Kalle & Company contemporaneously with the sign-
3874 ing of the Du Pont-Sylvania license agreement—Kalle, the company that the Government says was a co-conspirator and involved with us in all the plots we are supposed to have had. And what does Mr. Hatt say about the agreement? He says, "There has been no arrangement made whatsoever for the exchange of technical information or 'know-how' "—that appears from the face of the agreement—"and nothing that savors of an agreement along other lines of business."

And when the Government comes in here later and talks about a price agreement and talks about production agreements and talks about territorial agreements with Sylvania, here is one bit

of evidence—there will be many more as we go along—where it says clearly and contemporaneously at the time that there is nothing in this agreement that savors along other lines of business.

Mr. MINICUS. I would like to move that those remarks be stricken from the record, your Honor. The Government has not introduced that evidence as yet, and until it does these declarations are self-serving.

Mr. GESELL. I am reading from a Government exhibit, your Honor, read entirely to the Court.

The COURT. I don't think I will strike the comments. They are not evidence and are simply Mr. Gesell's interpretation of what he thinks it shows.

All right, Mr. Tubridy.

Mr. TUBRIDY. Next on your index, your Honor, is
3875 the British Cellophane Limited agreement with Du Pont Cellophane Company.

* * * * * *

3884 Mr. TUBRIDY. Still on agreements, sir, I would like to offer in evidence Exhibit 1110, page 1235, which is more or less of a formal agreement with regard to the taking over of the Du Pont Cellophane Company by the duPont parent company.

(Agreement between E. I. duPont de Nemours & Company and British Cellophane Limited, dated March 17, 1939, was received in evidence and marked "Government Exhibit No. 1110.")

The COURT. Why were they so late? I thought it was in June, 1936, that they went out of existence.

Mr. TUBRIDY. There was one Du Pont Cellophane Company that went out of existence, then another Du Pont Cellophane Company did come into existence.

The COURT. After '36?

Mr. TUBRIDY. I forget the exact years.

The COURT. That came out this morning. Can you help me on the chronology, Mr. Gesell?

3885 Mr. GESELL. Yes, sir.

The COURT. I have a date in my mind June 30, 1936.

Mr. GESELL. On June 21, 1923, we had the incorporation of Du Pont Cellophane Company and on July 1, 1936, the incorporation of Du Pont Cellophane Company, Inc.—or rather that corporation was dissolved.

The COURT. That is what I thought.

Mr. GESELL. And its assets and business were acquired by the Du Pont Company.

The COURT. I see.

Mr. GESELL. So that that is the date your Honor had in mind.

The COURT. That is the date I had in mind.

Mr. GESELL. July 1, 1936.

The COURT. I am trying to see what happened in three years. As I understand it now, du Pont Company, as we know it today, by this agreement represented by Government's Exhibit 1110, assumed and took over all the obligation, liabilities and rights which the former Du Pont Cellophane Company had insofar as British Cellophane Limited is concerned. I am just trying to account in my own mind at least for that period of hiatus there as to what occurred in the three-year period.

Mr. GESELL. It looks to me as though the agreement was late.

3886 The COURT. Under Delaware corporation law I have doubt as to its legal effect, as a matter of fact, and I was just wondering, is there any point to be made of that or do I forget it?

Mr. TUBRIDY. As a matter of fact, your Honor, I had doubts with regard to the prior agreement with Kalle when they just notified Kalle that the parent company was taking over the other company.

The COURT. All right, proceed.

Mr. TUBRIDY. This is an agreement made the 17th day of March, 1939. It is:

"Between E. I. du Pont de Nemours & Company, a Corporation incorporated under the laws of the State of Delaware hereinafter referred to as 'Du Pont De Nemours') of the one part and British Cellophane Limited, a Company incorporated under the laws of England (hereinafter referred to as 'the British Company') of the other part

"Whereas:

"(1) On the 3rd day of May 1935 Du Pont Cellophane Company Incorporated (a Corporation incorporated under the laws of the State of Delaware hereinafter referred to as 'Du Pont Cellophane') and the British Company entered into an agreement a copy whereof is annexed hereto (hereinafter referred to as 'the said agreement');

3887 "(2) On the 30th day of June 1936 Du Pont Securities Company a corporation incorporated under the State of Delaware (hereinafter referred to as 'Du Pont Securities') acquired all and singular the rights property assets privileges and Goodwill of Du Pont Cellophane * * *."

Mr. GESELL. May I interpose?

Mr. TUBRIDY. Yes.

Mr. GESELL. This is admitted on the pleadings.

The COURT. Where?

Mr. GESELL. Page 3, the allegation is made that we assumed these contractual rights at about 1936. We have admitted that in the answer, and the printed comparison appears on page 4. You will see the complaint on the left-hand side in paragraph 3 and the answer on paragraph 4 that the contractual rights and obligations were assumed by duPont, and I don't think there is any issue about it.

Mr. TURRIDY. I just offer it in evidence.

The COURT. Well, instead of reading the entire agreement, just identify the parties and date and put it in evidence.

Mr. TURRIDY. That is the only point in it, sir. It is very short. It is two pages.

The COURT. But "Art is long and time is fleeting," and we have got to go along. It is in evidence now, is it?

Mr. TURRIDY. Yes.

The COURT. Fine. Proceed.

3888 Mr. TURRIDY. That was the ultimate agreement that was developed between Du Pont and British Cellophane Limited.

I would like to present a few documents which led up to that agreement.

I offer in evidence Government's Exhibit 1111, at page 1245.

(Cross Reference Sheet and letter from Comptoir to Mr. Yerkes dated January 7, 1932, were received in evidence and marked "Government's Exhibit No. 1111.")

Mr. TURRIDY. The first page of the exhibit is a cross reference sheet. The second and third pages of the exhibit are a letter from Comptoir to Mr. Yerkes dated January 7, 1932. The first sheet states:

"Name or Subject Competitors—Cellophane.

"Regarding René Bernheim to L. A. Y. L. A. Y. reply. Reporting on meeting of Sidac, Kalle, Wolff and La Cellophane held on the 5th and 6th of January.

"Also advised that Sylvania Co. (according to Mr. Van Ham of Sidac) have 7 machines equipped and 6 working full; that they have low cost prices and ready sales for their production.

"Advised that Wolff intends to make an agreement with the Transparent Paper Co.

"Advised that they (La Cellophane) have been approached by Mr. Hanbury Williams of Courtaulds, suggesting
3889 an agreement for Courtaulds to make Cellophane in England, but of course excluding the manufacture of it by The Viscose Company in U. S. or Canada."

May I call your Honor's attention to the last paragraph on the second page, which says:

"On the other hand, we have been approached by Courtaulds through Mr. Higgins, who is a personal acquaintance of one of Courtaulds directors, Mr. Hanbury Williams. Courtaulds wants to negotiate with us to study if an Agreement is possible. We intend to answer this week that we are opened now to study the question. Our intention will be to make a condition, i. e., that the American Co. will not make Cellophane or moistureproof Cellophane in the United States, or Canada."

Now, sir, the American Viscose Company is a wholly-owned subsidiary of Courtaulds engaged in the rayon industry.

Mr. GESELL. And manufacturing cellophane in the United States now.

Mr. TUBRIDY. I am speaking as of this time. I am not testifying.

Continuing: "This conditions has already been expressed by me personally to Mr. Hanbury Williams a few weeks ago. I had the impression that Courtaulds would accept this condition for United States, but Mr. Hanbury Williams expressed his deception that they would have no share of the Canada market
3890 and asked if some agreement can not be found with Du Pont Cellophane Co."

That is (sic) deception.

May I enter a word here that the Government does not say that the rest of this letter is not pertinent and relevant, but it is addressing its remarks at the present time to the Courtaulds British Cellophane developments.

I would like to call your Honor's attention in this regard to Government's Exhibit 1112, which has already been offered in evidence, at page 1248. At the time that was offered in evidence I mentioned to your Honor that there was a paragraph there that would come up at a later time which would also mention who was Courtaulds, and that is the paragraph to which I now have reference, and I read from the exhibit:

"We are naturally interested in your negotiation with Courtaulds for a possible English plant. From our point of view it would be a very happy solution with the proviso which you have insisted on in accordance with our contract, that Courtaulds shall not use information obtained from you for a possible English plant to build a similar plant in the United States or Canada. In other words, that Courtaulds shall be excluded from this country and Canada. I would appreciate being kept advised as to how this matter continues."

3891 The Government offers in evidence Exhibit 1113, at page 1250. This is dated January 22, 1932. It is the minutes of the Board.

(The minutes of January 22, 1932 were received in evidence and marked "Government's Exhibit No. 1113.")

Mr. TUBRIDY. It is rather difficult to decipher, but the contents of it states:

"Licensing of Cellophane Rights in England to Cortaulds Limited:

"Mr. Albert Blum orally informed the Board that he had recently received advice from La Cellophane, our French Associates, that the latter were negotiating with Cortaulds, Ltd. covering the licensing of Cellophane rights in England."

Then the handwritten entries:

"Early in March, 1932, J. E. Hatt received letter from duPont London office, stating that Cortaulds are reported to have 25% of England's Cellophane business."

A further notation dated 5/12/32: "B. M. M. said he understood the negotiations between La Cellophane and Cortaulds were discontinued with no agreement reached."

I call your Honor's attention to Government Exhibit 1033, which is also in as Government Exhibit 1114, and was removed because it was a duplicate of 1033. If you have that one in your book you don't have to get the other one.

The COURT. What was the earlier number?

3892 Mr. TUBRIDY. 1033. 1114 is a duplicate of 1033, and 1114 has been withdrawn and replaced by 1033.

When we reviewed this, your Honor, this was first offered in evidence and was offered in connection with showing the division of world territories and the allotments, and we can again run through it, and it indicates that it is a memorandum to the Executive Committee by Mr. Yerkes, and this points out discussions they had with Mr. Hanbury-Williams as to the division of territories, and that Mr. Hanbury-Williams then went to Mr. Bernheim, and Mr. Bernheim then wrote back to the duPont people and finally they worked out the arrangement and division of territories which was finally put in this agreement.

I think that is all I have to say in that connection, your Honor, because it has already been covered at length before.

Now you will have to bear with me for a little bit on this, because I am going to bring in three documents which are a little bit lengthy, but they have to all go in in order to illustrate just five lines of the last page of the third letter with regard to the restrictions, prohibitions, and preventing of the development of cellophane in the United States by other companies.

I offer in evidence Government Exhibit No. 68. You have it in your book, sir, the same thing, under Government Exhibit 1115, but it is presently introduced by me as Government

3893 Exhibit 68.

(The letter from P. H. Chase to Mr. L. A. Yerkes, dated April 30, 1935, was received in evidence and marked "Government's Exhibit No. 68.")

Mr. TURRIDY. This is a letter dated April 30, 1935, from Mr. Chase to Mr. Yerkes, entitled "Sylvania Corporation Shares."

"At the end of Friday afternoon, April 26th, I had a telephone call from Mr. Ch. Gillet, who said he would like to have a talk with me at my convenience; but preferably as soon as possible. I therefore called on him right away.

"Mr. Ch. Gillet told me that during his visit to America, he had discussed with our people the matter of the Sylvania shares belonging to Baron Jansen and other interests. He had been advised that the offer of those shares could not be considered, as they would give a majority in that company. Such a purchase might therefore be considered as contrary to the stipulations of some of the existing American Laws.

"Baron Jansen has now advised Mr. Gillet that he has been approached on several occasions by Mr. Orlando Weber's representative in Belgium, as the latter wants to purchase Baron Jansen's shares in the name of Allied Chemical. Baron Jansen only disposes personally of 105,000 shares, which means 25%
3894 of the capital of the Sylvania Corporation which, according to Mr. Gillet, amounts to 420,000 shares. He thought that we might perhaps be interested in purchasing that parcel since there could not be the legal objections brought up previously, while we might perhaps prefer to buy those shares rather than seeing them go to Allied Chemical. Baron Jansen had, it appears, quoted a price of $25.—in his previous offer, but in view of the decrease of the Belgian Franc might consider the price of $20.

"Mr. Ch. Gillet asked me to make it quite clear that Baron Jansen's new approach in this connection was not due to any desire to take advantage of circumstances, but simply to a feeling of friendliness for Mr. Gillet and our Company, in order to let us know how matters stood and give us a chance of thwarting Allied Chemical's move if we so desire.

"Your decision, as a fact, hinges absolutely on only one point, namely, whether you want to prevent Allied Chemical from having anything to say regarding the future conduct of the Sylvania Corporation, which might cause a much keener competition between that company and the duPont-Cellophane Company. Making an investment of $2,100,000.—in the Sylvania Corporation just for that purpose would not seem however to be justified, specially when Allied Chemical, if they do not buy the shares of Baron Jansen, may possibly secure those belonging to other in-

terests, for instance those which Baron Jansen had grouped
3895 with his when making his first offer.

"Mr. Gillet asked me to cable those news to Wilmington, preferably by special code. I telephoned immediately to the London Office in case they had a special code and also to keep them advised. Mr. Gillet had told me that Baron Jansen would like to have an answer of principle in about a week or ten days, that is, whether we are not at all interested, or whether we might possibly be interested and willing to discuss the matter further.

"I suggest therefore that, after receiving this letter and thinking the matter over, you send us a cable giving us your decision."

The Government offers in evidence Exhibit 1116, dated May 8, 1935. That appears at page 1256.

(The letter from Mr. Yerkes to Mr. Chase, dated May 8, 1935, was received in evidence and marked "Government's Exhibit No. 1116.")

Mr. TUBRIDY. This is a letter from Mr. Yerkes to Mr. Chase, dated May 8, 1935.

"SYLVANIA INDUSTRIAL CORPORATION:

"Your letter of April 30th has just come in, and I am sorry to say does not clarify this situation at all.

"When Mr. Gillet was over here recently we certainly indicated very clearly and distinctly to him that we would not be in-
3896 terested in the purchase of any shares of the Sylvania Industrial Corporation, for the very obvious reason that under the American laws we could not buy control and under no consideration would we want a minority interest even if that were allowable under the law, which it is not.

"In other words, the question which Mr. Gillet raised with you in Paris, recently was definitely settled several weeks before that, when he was in New York, and I frankly cannot understand why he is bringing the matter up again in this manner.

"Furthermore, for your own very confidential information, we indicated to Mr. Gillet when he was here that if he and Baron Jansen wanted to dispose of the control of Sylvania to the American Viscose Company we would have no objections. Mr. Gillet has entirely ignored this, apparently with you and certainly with us, since he left New York. By that I mean that he has not let us know whether they wanted to consider the matter along those lines or not. I should not say anything to him about this unless he brings it up, in which case do not hide the fact that you know the circumstances.

"At any rate, the definite answer to your cable and your letter of April 30th is that we are not interested in the purchase of

105,000 shares of Sylvania stock, and I have cabled you to that effect today.

"Yours very truly,"

3897 The Government offers in evidence Exhibit 1117, from Mr. Chase to Mr. Yerkes, dated May 20, 1935, re: Sylvania Industrial Corporation.

(The letter from Mr. Chase to Mr. Yerkes dated May 20, 1935, was received in evidence and marked "Government's Exhibit No. 1117.")

Mr. TURRIDY. (Reading.)

"Your letter of May 8th under the above title and confirming your cable of same date, has been received and helps me to understand the situation better.

"You may be interested to learn that, during talks which have taken place last week with Mr. Rene Bernheim at the time Mr. Swint was here, this matter came up again incidentally. Mr. Bernheim thought it was too bad that we could not purchase either the majority or an important share of the Sylvania Corporation stock. Mr. Swint explained to him that, according to the American law, this was out of the question, whether the amount of shares considered constituted a majority or a minority.

"Mr. Bernheim then alluded to the suggestion made to Mr. Gillet, that the American Viscose Company might be considered as a very suitable party for acquiring the majority of the Sylvania Corporation. It appears that the reason for which Mr. Gillet nor Mr. Bernheim himself had thought this advisable is because, at the time of their negotiations with Courtauld's for manufacturing Cellophane in England, they had gone to such

3898 trouble and had insisted to such an extent to obtain that Courtauld's should not manufacture any transparent Viscose film in the United States. This makes it, in their opinion, very difficult for them to come back on all those arguments. I pointed out to Mr. Bernheim that Mr. Gillet had never answered our suggestion nor had he given us those reasons.

"Mr. Bernheim insisted again on the importance that he and his associates attached to the securing of those shares of the Sylvania Corporation that might be on the market at present. He asked if it was not possible to arrange for some independent persons or companies to buy those shares and hold them for us. He even offered to have the Comptoir buy and hold those shares for our Company. Mr. Swint, however, explained that in view of the present American legislation, this seemed to be an extremely difficult thing to do, if not impossible. Mr. Bernheim said that he was awfully sorry of this, as he considered the matter very important although he was not at liberty to give us the reasons prompting his suggestion and his insistence concerning it."

So far as the contract itself and how it was arrived at, I am through with that particular group, and if Mr. Gesell wants to comment on it now, he may, or I may go on and finish with B. C. L. completely.

The COURT. Have you covered——

3899 Mr. TUBRIDY. Just the agreement, sir.

The COURT. That covers sub-paragraph (a)?

Mr. TUBRIDY. Yes, sir.

The COURT. You still have (b) and (c) under that heading?

Mr. TUBRIDY. Yes, sir.

3900 Mr. GESELL. May I first call your Honor's attention to the pleadings, paragraph 18 of the print on page 24. It is alleged among other things there that during 1946 Sylvania was acquired by American Viscose Company, a corporation organized and existing under the laws of the State of Delaware and the largest producer of viscose rayon in the United States. That allegation is admitted in the answer. American Viscose is the company which is competing with duPont in the active manufacture of cellophane today.

Now, against that fact which the Government itself puts forward, I call your Honor's attention to what occurred on pre-trial. On pre-trial the Government stated that American Viscose Company was a corporation which was excluded from the manufacture of cellophane, and these documents presented as background to the contract apparently bear on the issue of whether or not duPont excluded American Viscose, the company now manufacturing cellophane in the United States, from manufacturing here.

The key document on that issue is Exhibit 1116, which is one of the documents introduced by Mr. Tubridy a moment ago. That document is dated May 8, 1935. The contract with B. C. L. was made April 12, 1935. So it is within less than a month of the time of the contract. And Mr. Yerkes advises one of the gentlemen in the London office of the company that he has in-

3901 formed the French that there is no objection on duPont's part to American Viscose buying control of Sylvania.

I point up those facts to show that there was no exclusion of American Viscose by duPont. DuPont's only concern was that Courtaulds, the organizer of British Cellophane, should not utilize the information that it received, technical information that it received, to set up a corporation back here and compete with duPont in the United States because that information was licensed for the limited area of B. C. L., and that is what is spelled out very clearly in Exhibit 1112.

The contract itself, which was the first document read by Mr. Tubridy, with B. C. L. is another license agreement made under the same circumstances and for the same reasons that the Kalle agreement was made, which we discussed earlier this morning.

La Cellophane and Courtaulds organized a British company. La Cellophane licensed the British company. Under paragraph 6 of the basic technical agreement we were then obligated to transmit our technical information to B. C. L. This contract carries out that commitment, and as we have seen at the same time resolved the ambiguities in the contract as to the meanings of the words "North America," as to whether or not it included islands belonging to the British Empire in the Caribbean.

Mr. TUBRIDY. I, too, your Honor, would like to call your
3902 Honor's attention to the dates. The top letter states, "The agreement bears date of May 3, 1935, although our company first executed under date of May 12, 1935—" in other words, they didn't care what happened with regard to Viscose after they had Courtaulds sewed up.

The documents I am going to take with regard to the rest of the B. C. L. situation, sir, are quite lengthy. Would you like to take a recess at this point?

The COURT. Let us take a mid-afternoon recess.

(At this point a brief recess was taken.)

Mr. GESELL. Your Honor, there appears to be a close issue of fact here on the exhibits we just finished discussing, which I think perhaps I should interpose to clarify our position on.

I am talking with respect to Exhibit 1116. I pointed out that that document stated that we had told Mr. Gillet that there was no objecion to American Viscose acquiring Sylvania's stock. That is in the fourth paragraph, and it was only on Mr. Tubridy's rebuttal to that remark that I understood the Government's position for the first time. He said, that is true, we told them, but it was after, his comment was, we had Courtaulds sewed up, by which I gathered he meant after we had entered into agreement preventing American Viscose from taking that step.

May I call your Honor's attention to the sequence here
so it will be clear that that is not the situation. The
3903 basic agreement was first executed on April 12, 1935, as appears from Government's Exhibit 1109. Mr. Gillet spoke to Mr. Chase Friday afternoon, April 26, as appears from Exhibit 68, and Mr. Yerkes states in 1116 that the question Mr. Gillet raised in Paris was definitely settled several weeks before that, when he was in New York. Well, several weeks before the 26th of April shows clearly that the matter of American Viscose acquiring Sylvania was disposed of as indicated in 1116 prior to the execution of the B. C. L. agreement.

Mr. TUBRIDY. Your Honor, I suppose we could continue with this, so I would just like to dispose of it as far as we are concerned with one comment, and that is that the closeness of time and the fact that the written contract was dated April 12 does not negate

the fact that a complete understanding had been entered into with regard to these companies that was agreeable to both prior to that date. And there is a complete about face on the part of duPont and what brought it about.

I would like to offer in evidence Government's Exhibit 1118. This is a letter from Mr. Pralatowski to British Cellophane Company, Limited, dated November 4, 1936.

(Letter from Mr. Pralatowski to British Cellophane Company, Ltd., dated November 4, 1936, was received in evidence and marked "Government's Exhibit No. 1118.")

Mr. TURBRIDY. It reads:

"GENTLEMEN:

3904 "British Charch & Prindle Patent No. 283,109.

"In agreement with your wishes, we are pleased to send you herewith an assignment of this British Charch & Prindle patent No. 283,109 from E. I. du Pont de Nemours & Company to your Company. This replaces the license agreement now existing.

"I am sending you this assignment of the entire right, title and interest to the British patent, we should like to make it clear that this is forwarded as a matter of general convenience to you and that your equitable rights under the assignment are only those dictated by the technical agreement existing between us and yourselves, which in turn bears on the agreement existing between us and Societe La Cellophane. If, therefore, we should subsequently have need of any part of this patent not covered by these agreements, we shall consider that they are available to us.

"We also desire to point out that this assignment is sent in the spirit that if you shall have occasion to license some other manufacturer of transparent moistureproof material in England, you will impose on him such restrictions as will confine his manufacture and sale of the material covered by the patent to the specific jurisdiction of the British patent. You will restrict him, for example, from making under the patent in England and selling in other countries such as Canada, United States and Mexico

3905 and the territories of our French and German associates.

"You will understand that we appreciate that you concur completely in our own views in these matters and that these conditions are in fact merely a restatement of those which have always been present in our relations. We will appreciate your acknowledgment of this document."

3906 The Government offers Exhibit 1119.

(Letter from Mr. Pralatowski to British Cellophane Limited dated January 19, 1937 was received in evidence and marked "Government's Exhibit 1119.")

Government's Exhibit 1179

Mr. TOMKINS. This is a letter from Mr. Pralatowski addressed to the British Cellophane Limited dated January 19, 1937, attention Mr. J. C. Hanbury Williams, Director, re: Assignment to British Cellophane Limited.

"We refer to your letter of November 27, 1936 and the attached copy of a letter, dated November 26, 1936, from your solicitors, Messrs. Ashurst, Morris, Crisp & Co. relative to the assignment of British Patent No. 283,109 and British Patent No. 380,483 to British Cellophane Limited. We enclose an extra copy of the present letter for your convenience in passing on this information to your solicitors at your pleasure.

"We have arranged with the Officers of our Company to assign to British Cellophane Limited both of these British Patents, namely, Patent No. 283,109 and No. 380,483. Accordingly, we transmit such an assignment together with the several documents necessary to show complete chain of title. The following documents are included:

"Du Pont Cellophane Company, Inc., to E. I. du pont de Nemours & Company. Assignment dated April 1, 1929,
3907 covering British application No. 34,916.

"E. I. du Pont de Nemours & Company to Du Pont Cellophane Company, Inc. Assignment dated April 1, 1929, covering British application No. 34,916.

"Du Pont Cellophane Company, Inc. to Du Pont Securities Company, dated June 30, 1936, assignment covering British Patent Nos. 283,109 and 380,483.

"Du Pont Securities Company to E. I. duPont de Nemours & Company, dated July 1, 1936, assignment covering British Patent Nos. 283,109 and 380,483.

"E. I. du Pont de Nemours & Company to British Cellophane Limited, dated January 13, 1937, assignment covering British Patent Nos. 283,109 and 380,483.

"The British application No. 34,916 eventually matured into British Patent No. 283,109. The British application was filed in the name of the original Du Pont Cellophane Company, Inc. and, to the best of our knowledge, the British Patent No. 283,109 still stands in the name of that Company insofar as the British Patent Office records are concerned. While the British application No. 34,916 was still pending in the Patent Office, the Du Pont Cellophane Company, Inc. underwent a reorganization and the
first two assignment documents enumerated above, dated
3908 April 1, 1929, show the transfer of title from the original Du Pont Cellophane Company, Inc. to E. I. du Pont de Nemours & Company and thence to the newly organized Du Pont

Cellophane Company, Inc. At this time, the application from which British Patent No. 380,483 was issued had not yet been filed. Consequently, there is no reference to this case in these particular assignments.

"The next two assignment documents enumerated above show the transfer of title in the two issued British patents by which the title was acquired by E. I. duPont de Nemours & Company.

The last assignment document in the list, assigning both of these British patents to British Cellophane Limited is to be substituted for the document executed by E. I. duPont de Nemours & Company and transmitted to you with our letter dated November 4, 1936, the document transmitted at that time for assignment of title for only British Patent No. 283,109. In order to keep the records clear, we shall appreciate it if you will disregard the former assignment document, returning it to us so that we may dispose of it properly.

"At the risk of repetition but for the convenience of having a reasonably self-contained letter, we wish to say that in sending you this assignment of the entire right, title, and interest in and to British Patent Nos. 283,109 and 380,483, we should like
3909 it clear that this is forwarded as a matter of general convenience to you and that your equitable rights under the assignment are only those dictated by the technical agreement existing between us and yourselves which, in turn, bears on the agreement existing between us, and Societe La Cellophane. If, therefore, we should subsequently have need of any part of this patent not covered by these agreements, we shall consider that they are available to us.

"Furthermore, we would like to point out that this assignment is sent in the spirit that if you shall have occasion to license some other manufacturer of transparent moistureproof material in England, you will impose on him such restrictions as will confine his manufacture and sale of the material covered by the patent to the specific jurisdiction of the British Patent. You will restrict him, for example, from making under the patent in England and selling in other countries such as Canada, United States, Mexico, and the territories of our French and German associates.

"With regard to the assignment of these two patents to British Cellophane Limited, we were informed by La Cellophane in a letter, dated December 9, 1936, that they had no objection to our making these assignments.

"As you can readily appreciate the first four of the assignment documents listed above, will be needed only for the recording
3910 of the chain of title in these two patents before the Patent Office. We have borrowed them from our Secretary's files

and ask that you be kind enough to return them to us as soon as possible after they have served their purpose.

"With regard now to the licenses granted to La Cellophane by the Du Pont Cellophane Company, Inc. under these two British patents, we believe it is true that La Cellophane has granted an exclusive sub-license to British Cellophane Limited for the same scope and duration as the original exclusive licenses were granted to them. At least we have in our files a copy of the sub-license in the form in which it was proposed to be executed which form was transmitted to us by Mr. Bizet with a letter dated April 16, 1935. Whether or not this license form was executed and whether or not it was recorded in the British Patent Office, our file does not show, but we presume that it was executed at least. Certainly with the present assignment of these two British patents to British Cellophane Limited and the exclusive sub-license from La Cellophane to British Cellophane Limited, arrangements should be possible for a clarification of the rights and privileges under these patents before the Patent Office record.

"Your solicitors have referred to the matter of the dissolution of the Du Pont Cellophane Company, Inc. and the assump-
3911 tion of the obligations of the latter by E. I. duPont de Nemours & Company. As you were advised in the letter of July 2, 1936, the obligations of the Du Pont Cellophane Company, Inc., as set forth in the agreement of May 3, 1935, were to be assumed and performed by E. I. duPont de Nemours & Company. We are not quite clear, from the letter of your solicitors, as to just what questions they have in mind regarding this assumption of responsibility. If the above discussion and the series of assignment documents transmitted herewith fail to clarify the matter, we would be very much pleased if you would have your solicitors set down just what questions are troubling them in order that you may write to us again on this particular point, whereupon we will endeavor to assist to the best of our ability in making the situation clear.

"We are pleased to be of assistance in this matter and if anything further arises, we shall be pleased to wait upon you.

"Very truly yours,

"TECHNICAL DIVISION,
"F. M. PRALATOWSKI,
"*Director of Patent Service.*"

3912 Mr. GESELL. It looks there, your Honor, if I may interpose, that we wrote them a letter at the time on the 16th, the date in the next to the last paragraph, and then their solicitors came along and said they wanted a more formal document, and we later executed that formal document your Honor was talking about. That begins to look as though that is the way it happened.

We have no dispute with the Government that we licensed patents under this agreement, your Honor, if that will expedite this process in any way. There has never been any dispute, as far as we are concerned, that we carried out the agreements.

Mr. TUBRIDY. We would like to have the documents come in. I will point out the particular paragraphs that I would like to have your Honor read with particular attention so that you will get the force and effect as to what was said with respect to these documents.

With regard to this Exhibit 1119 may I call your attention to the top paragraph of page 3: "* * * that this is forwarded as a matter of general convenience to you and that your equitable rights under the assignment are only those dictated by the technical agreement existing between us and yourselves which, in turn, bears on the agreement existing between us and Societe La Cellophane."

In other words, they are all tied in.

3918 Then in the next paragraph: "Furthermore, we would like to point out that this assignment is sent in the spirit that if you shall have occasion to license some other manufacturer of transparent moistureproof material in England, you will impose on him such restrictions as will confine his manufacture and sale of the material covered by the patent to the specific jurisdiction of the British patent. You will restrict him, for example, from making under the patent in England and selling in other countries such as Canada, United States, Mexico, and the territories of our French and German associates."

Now, where can you get the import of that, your Honor, unless this document is presented to you?

Mr. GESELL. The contract says so specifically, and that is precisely what we have said all along.

* * * * * *

3931 The Government offers in evidence Exhibit 1130, appearing at page 1281.

(The letter from Mr. May, Assistant General Manager, to Mr. Hanbury-Williams, dated September 1, 1938, was received in evidence and marked "Government's Exhibit No. 1130.")

Mr. TUBRIDY. This is a letter from Mr. May, Assistant General Manager, to Mr. J. Hanbury-Williams, dated September 1, 1938, in which it is stated:

"You will recall last year we had considerable correspondence and an exchange of cables in order to give you a clear assignment of our moistureproofing patents in the British Empire to the territorial extent limited by our respective technical agreements.

"We are curious to know whether you actually entered suit

against some of those companies whom you suspected of infringement or whether you were able to negotiate satisfactory licenses with them.

"You will appreciate our interest in the maintenance of these moistureproofing patents and will understand that our inquiry is to determine your idea of their present status in your country."

The Government offers in evidence Exhibit 1131, appearing at page 1282.

Government's Exhibit 1131

(The letter from British Cellophane Limited to Mr. May, dated September 22, 1938, was received in evidence and
3932 marked "Government's Exhibit No. 1131.")

Mr. TURRIDY. This is a letter from British Cellophane Limited to Mr. May, dated September 22, 1938, in which it states:

"There has been some delay in replying to your letter of September 1st owing to the holidays of some members of the staff.

"With reference to the results of the considerable activity and correspondence dealing with the assignment of your moistureproofing patents, this Company has now been formally registered as owners of the Patents Nos. 283,109 and 380,483. We wrote your Company to this effect on April 13th last. Since then we have purchased and tested samples of suspected brands of competitive moistureproof film, and the results have been submitted to Mr. Trevor Watson, K. C., one of the leading Counsel of the Patent Bar, for advice on the question of infringement. Unfortunately, owing to pressure of work, Mr. Trevor Watson found himself unable to give an opinion at the time, but we hope to receive Counsel's opinion regarding this important question very shortly.

"The only license granted by us under these two Patents is the Sub-license dated 16th December 1936 to British Sidac Limited, and as you see by the above the question of infringement of others is being dealt with by our legal advisers."

3933 The Government offers in evidence Exhibit 1446, appearing at page 1923.

(The letter from C. B. McCoy to Mr. J. K. Jenney, dated March 3, 1939, was received in evidence and marked "Government's Exhibit No. 1446.")

Mr. TURRIDY. This is a letter from the London office of duPont, and is addressed to Mr. Jenney. It is dated March 3, 1939, and it states:

"We have received copy of your letter of February 21st, to Mr. G. H. Andrews, requesting information on the moisture-proofing processes of Transparent Paper Limited and Wolff & Co. Mr. Bizot has informed us that a complete story on the moisture-

proofing process of Transparent Paper, together with the results of a study of their moisture-proof product, has recently been forwarded to Wilmington by British Cellophane.

"The position is that the moisture-proof product of Transparent Paper is inferior to the product of B. C. L., and further the question of infringement is not 100% established. B. C. L. have the majority of the British market for moisture-proof, and as long as their product is better they feel that they can hold this market. Transparent Paper hold a certain percentage of the Tobacco Company business through connections and would hold this business in any case. The problem is being given consideration but
3934 B. C. L. have not yet decided to institute proceedings against T. P. L.

"The same decision has been made as regards Wolff & Co. The I. G. and Kalle still contend that they have no control of the Wolff Management. Wolff & Co. claim to use a batch process for moisture-proofing, which does not infringe the duPont process. This claim is not accepted without question. Wolff & Co. have been shipping some moisture-proof into the English market. However, because of its poor quality, it is not considered a serious competitor, and B. C. L. have not so far decided to take steps against Wolff & Co.

"Mr. Bizot indicated the B. C. L. hope to do 10,000,000 lbs. business this year. As you know, they are installing at Bridgewater two new machines manufactured secretly in France having double the width and twice the speed of the present machines."

I have just one more exhibit, sir, in connection with B. C. L. and that deals with licensing of British Sidac by B. C. L.

Mr. GESELL. Mr. Tubridy wants to know if I want to objection. I assume all my objections are running to this under the arrangement we have, your Honor.

Mr. TUBRIDY. I wanted to know if you wanted to make your objection in this case.

3935 Mr. GESELL. This is not anymore objectionable than some of the others.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1441, which appears at page 4899.

(The licensing agreement between British Cellophane Limited and British Sidac, dated December 11, 1936, was received in evidence and marked "Government's Exhibit No. 1441.")

Mr. TUBRIDY. Briefly, sir, this is a licensing of British Sidac by British Cellophane Limited of the moisture proofing patents. I would like to call your Honor's attention to the pertinent provisions with regard to that, paragraph 17. It is page 10 of the licensing agreement, sir. They are numbered at the top of the

page, containing therein a limitation of territories which corresponds to the original B. C. L.-duPont agreement.

The COURT. Yes, sir.

Mr. TUBRIDY. That is all, sir.

(There was a discussion off the record.)

3936 Mr. GESELL. Your Honor, my comments on this group will be very brief. I again want to emphasize that they show that this technical agreement between duPont and B. C. L. was administered in a precise and business like manner in accordance with its terms, as a technical licensing agreement, which is what it was. You can see both in Exhibit 1119 at page 1263 and elsewhere very clear evidence of that.

Now, a large number of these exhibits going from Exhibit 1123 to Exhibit 1129, as well as Exhibit 1120, a group in all of about seven or eight of the ones Mr. Tubridy read, he has offered as showing the handling of a patent license under the agreement. I simply want to call your Honor's attention to the fact that those documents have nothing to do with a license under the agreement whatsoever. They pertain to patent 1,823,769, which as indicated on Exhibit 1120, the first of this series, is purely a patent not within the scope of these agreements. It has no relation to the operation of the B. C. L. agreement whatsoever, as the documents themselves show.

Finally, if your Honor will turn to Exhibit 1130 relating to the question of the infringement of the British moistureproof patent, I would like to call attention to the fact that here——

The COURT: I believe that was September, 1938, 1130.

3937 Mr. GESELL. That here you have evidence of two companies competing with British Cellophane, the German company Wolff, which the Government contends on other exhibits was part of some consortium or invention, and also another independent British company.

There is one other small note at the foot of Exhibit 1446 at page 1923. You will notice there the reference to the fact, as late as 1939, when the British desired the necessary machinery to manufacture in England cellophane, they had to have the machines manufactured for them in France.

Mr. TUBRIDY. Your Honor, just to keep the record straight, and not in connection with direct rebuttal of Mr. Gesell's comments, the documents were offered in evidence to display the operation and working out of what had transpired and developed between the two companies with regard to this agreement. I could go into greater explanation in detail with regard to the documents cited by Mr. Gesell. If you will look at the last paige of that, you will see explicitly that it deals with the B. C. L. and duPont arrange-

ments and discusses about how they would or would not get certain licenses, certain patents.

The next topic, sir, is the duPont-Canadian Industries Limited agreements. We don't find, your Honor, the agreements spelled out as such completely within the four corners of documents
3938 and then with appendages thereto coming along afterwards. They have an agreement, then there is an interpretation of the agreement, then they cancel parts of the agreement, they enter into new agreements, then the over-all agreement affects this agreement. So we have to wend our way through these various papers in order to achieve, to finally decide what was the contract and arrangement between C. I. L. and duPont.

Mr. GESELL. Your Honor, may I interpose with respect to that comment a moment. We are starting another new volume of documents.

The COURT. Yes.

Mr. GESELL. C. I. L. is alleged to be a co-conspirator. It would seem to me the way we should approach this is first to say who C. I. L. is, what it is, get it identified. This is one of the co-conspirators, and the Government has offered no exhibits as to who it is, how it is organized, how it functions, who are its directors, what products it makes, where its home offices are. In their Volume No. 1 they have done that with respect to B. C. L. and all of the other co-conspirators, and I have not raised the point. But it seems to me here we should have some indication of what we are talking about before we embark on what is another great mass of documentary material concerning relationships with the company.

Mr. MINICUS. I think the answer gives us quite a fair description—paragraph 6 of the answer.

3939 The COURT. What page?

Mr. MINICUS. I have a printed copy of the answer.

Mr. GESELL. It is page 8, that is the complaint, and page 9 is the answer of the comparison.

Mr. MINICUS. We had not considered this matter was in contention, your Honor.

The COURT. Well, my present ruling on the matter is going to be this. I think the objection really goes to the sufficiency of the proofs, and you point out that the answer with its admissions supplies the background material which it is now suggested is not present. On that basis I am going to tell Tubridy to proceed on the basis of the documents you are going to introduce.

Mr. TUBRIDY. May I have a moment with Mr. Gesell, please?

The COURT. Yes.

(Discussion at counsel table.)

Mr. TUBRIDY. Do you have Book 33, sir?

The COURT. I don't have it, but the Clerk will get it for me in a moment. Just give me the exhibit number.

Mr. TURRIDY. It is Exhibit 400 at page 5575, which we offer in evidence.

(Interrogatories No. 7 (a), (b) and (c), agreements between du Pont and Canadian Industries, Ltd., was received in evidence and marked "Government's Exhibit No. 400.")

3940 Mr. TURRIDY. This is in answer to plaintiff's interrogatories supplied by the defendant. It reads:

"Interrogatories No. 7 (a), (b) and (c).

"Agreements between du Pont and Canadian Industries, Ltd.

"Paragraph 11 of the answer, referred to in Interrogatory No. 7, includes mention of cellulose caps and bands. Du Pont never had an agreement, contract or understanding with Canadian Industries, Ltd. with respect to cellulose caps or bands.

"The earliest agreement concerning cellophane between du Pont and CIL was an oral one, set forth in Government Exhibit 1153.

"The oral agreement was superseded by a temporary agreement, effective April 1, 1932, referred to in Government Exhibit 1156. This agreement retained the provisions of the earlier one respecting terms of sale of cellophane to CIL, and royalty payments from net profits of CIL.

"As of November 1, 1933, a new agreement was entered into between du Pont and CIL, replacing the agreement of April 1, 1932. This is referred to in Government Exhibit 1157. CIL was to pay du Pont 15% of the net profits from the manufacture and sale of cellophane, and agreed to purchase from du Pont, at not more than du Pont factory cost plus 10%, any quantity of du Pont
3941 cellophane necessary to supply the Canadian market. Such payments were to cease after April 23, 1947.

"The cancellation of the agreement of November 1, 1933, and its supersession by the Triparty Agreement of 1936 (Government Exhibit 1143), is set forth in Government Exhibit 1144."

The footnote reads:

"The term 'du Pont' is used to denote the Du Pont Cellophane Co., Inc., and E. I. du Pont de Nemours & Co., Inc., as applicable."

It is the Government's position that the last paragraph is not pertinent.

Now, sir, if you want to make a note opposite those exhibit numbers, in case you have future reference, Exhibit 1153 appears at page 1340——

The COURT. Where do you want the notation made, on my set of exhibits?

Mr. TURRIDY. If you are going to use them, sir.

The COURT. Yes, I am going to use them.

Mr. TUBRIDY. 1153, when you want to look for the exhibits, is at page 1340.

1156 appears at page 1345.

1157 appears at page 1346.

The last one, Exhibit 1144 apears at page 1314.

3942 The COURT. Government Exhibit 1143, what was the pagination on that?

Mr. GESELL. 1298, your Honor.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1153, appearing at page 1340.

(The Advice of Action dated July 23, 1931, from Hess to Farmer was received in evidence and marked "Government's Exhibit No. 1153.")

Mr. TUBRIDY. This is an Advice of Action dated July 23, 1931. It states:

"Subject: Arrangement with Canadian Industries Limited: relative to Canadian Cellophane Business:

"Action taken by Executive Committee,

"At meeting July 22, 1931.

"Remarks:

"Referring to your letter of July 21st (#1028) advising that oral agreement had been reached between the Parent Company and the Canadian Industries Limited, in which the former holds a substantial financial interest, covering the following points:—

"1. Effective August 1, 1931, Cellophane sales in Canada shall be considered as under control of Canadian Industries Limited.

"2. Du Pont Cellophane Company, Inc. is to assist Canadian Industries Limited in establishing a plant in Canada
3943 for the manufacture of Cellophane, which it is expected will be ready to operate about March 1, 1932. When Canadian Industries Limited manufactures its own Cellophane, the Du Pont Cellophane Company, Inc. will commence to receive, as compensation, 15% of profits for 15 years from such Canadian manufacture of Cellophane.

"3. In the meantime, effective August 1, 1931, and until Canadian Industries Limited manufactures in Canada the Canadian Cellophane sales requirements, Du Pont Cellophane Company, Inc. will continue to ship Cellophane to Wm. B. Stewart & Sons, present Canadian Cellophane Agent, and to Stewart's customers, as in the past, as well as continue to render sales development assistance, invoices to be issued to Canadian Industries Limited instead of to Stewart at full manufacturing cost plus 10%, terms 30 days net. The basis for determining said cost is to be the average manufacturing cost of the shipping plant for the previous three (3) months, i. e. all shipments made during the month of August will be priced at the average cost for April, May and June

and September shipments will be based on the average cost for May, June and July. In addition, during this period, i. e. between August 1, 1934 and the time of Canadian manufacture of Cellophane, Canadian Industries Limited will remit quarterly to Du Pont Cellophane Company, Inc. 15% of the former's profits from its sale under this temporary arrangement.

3944 "After discussion, your letter above mentioned was ordered filed, a copy thereof being handed to Mr. Hatt who was present at the meeting, it being understood that in due course formal agreement covering these arrangements with Canadian Industries Limited will be submitted to this Committee."

The Government offers in evidence Exhibit 1156, appearing at page 1345.

(The paper headed "Detached From President's June 1932 Report to Cellophane Board of Directors—7/20/32" was received in evidence and marked "Government's Exhibit No. 1156.")

Mr. TUBRIDY. This states:

"Detached from President's June 1932 Report to Cellophane Board of Directors—7/20/32.

"Agreement with Canadian Industries Limited covering Canadian Cellophane Business:

"Since reporting to you in our July 1931 Report, dated August 18, 1931, that oral agreement had been reached with the C. I. L. covering our turning over to them of the Canadian Cellophane business on the basis of their paying us 15% of profits for 15 years, we have been operating under the arrangement and assisting C. I. L. in constructing and starting their Canadian plant. We recently executed a temporary agreement with C. I. L. as of April 1, 1932, considering the Cellophane business to be still under

3945 our control. This is for the purpose of establishing Canadian Cellophane manufacturing good-will in addition to the Cellophane selling good-will already established by us, in order to facilitate transfer to C. I. L. of the trade-mark "Cellophane" under a new Canadian law which becomes effective September 1, 1932. After this purpose has been accomplished it is intended shortly after the last mentioned date to execute another agreement formally turning over to C. I. L. all of our Cellophane rights in Canada."

The COURT. Can you give me a little help on this branch of the case?

Mr. TUBRIDY. I will try to, your Honor.

The COURT. As to your theory. Here is practically a wholly-owned subsidiary.

Mr. TUBRIDY. No, sir.

The COURT. I thought it was 85%.

Mr. TUBRIDY. 45% is owned by duPont. Roughly, half and half, with 45% owned by duPont, and 45% by I. C. I.

The COURT. Then what is this admission?

Mr. MINICUS. In the answer, your Honor?

The COURT. On page 9. "* * * that duPont and Imperial Chemical Industries Limited, own and for some time past have owned separate shareholdings totalling from 85% to 95% of the voting stock of C. I. L."

3946 Mr. MINICUS. You will notice there that duPont and Imperial Chemical Industries Limited own.

The COURT. Oh, the two of them. I see.

3948 The Government offers in evidence Exhibit 1158, appearing at page 1348.

(The paper headed "Portion of Letter, dated November 21, 1933, to C. M. Spargo, Wilmington Legal Department, 3949 from L. W. Haslett, Manager Cellulose Products Group, C. I. L." was received in evidence and marked "Government's Exhibit No. 1158.")

Mr. TUBRIDY. This is "Portion of letter dated November 21, 1933, to C. M. Spargo, Wilmington Legal Department, from L. W. Haslett, Manager, Cellulose Products Group, C. I. L.:

"In forwarding you this agreement for completion there are a few points which were covered in various discussions throughout the negotiations and which Mr. Purvis thinks we should record at this time in order to avoid any possibility of future misunderstanding.

"'A. At a meeting on 14th April 1952, at which Messrs. Yerkes, May, Farmer, Purvis and Haslett were present.

"'(I) whilst Mr. Yerkes thought that there was very little likelihood of the French Cellophane Company considering any suggestion that C. I. L.'s markets should be expanded into their territory, the Du Pont Cellophane Company were prepared to waive any objection on their part to C. I. L. supplying Cellophane at the request of the French Cellophane Company. This view was influenced by the fact that the forthcoming Imperial Conference at Ottawa might place C. I. L. in a very favourable position for competing with Courtaulds in British and Empire markets.

"'(II) in view of the overhead DuPont/C. I. L./I. C. I. agreement providing for the exchange of information be- 3950 tween the three companies, the Du Pont Cellophane Company would expect to give free of charge all information as to their developments, provided that C. I. L. would bear its due proportion of any out-of-pocket expenses, paid to others, incurred in respect of any individual development. Mr. Yerkes also stated that it was not the intention of the DuPont Cellophane Company

to insert or read into this agreement any obligation contrary to the spirit of the overhead Tri-party agreement.

"'B. Whilst it was the original of both parties to the agreement that full rights to the processes and trade marks should pass to C. I. L. and that C. I. L. would own the trade mark "Cellophane", it was the opinion of Messrs. Nims and Verdi that the assignment of trade marks to C. I. L. would invalidate these marks and it was agreed therefore that DuPonts must continue to control the manufacture and sale of "Cellophane" in Canada for so long as the trade mark "Cellophane" is used by C. I. L.'"

The COURT. Let me read that again.

Mr. TUBRIDY. Yes, sir.

The COURT. I don't get it.

Mr. MINICUS. In the middle of the sixth line it should be "marks" instead of "patents". Mr. Tubridy inadvertently said "patents" instead of "marks."

3951 The COURT. Is there any basis for Mr. Nims giving the opinion? I just can't follow it.

Mr. TUBRIDY. Just a few remarks, your Honor.

The COURT. Yes.

Mr. TUBRIDY. It develops further with regard to this correspondence there was no real point as far as the Government is concerned in connection with it. Apparently, a new Canadian law developed and they interpreted that Canadian law to provide that if Canadian Cellophane claimed and owned this trademark "Cellophane" that that would eliminate it as a trademark, and he translated the law to require that duPont would have to maintain control over the products in Canada in order to keep the trademark power, according to a Canadian law.

The COURT. I see.

Mr. TUBRIDY. (Reading.) "'It is our understanding that if the agreement be terminated on or after 23rd April 1947, in accordance with Clause 25, all obligations and restrictions will no longer apply, with the one exception that C. I. L. will cease to have any right to advertise or sell the product manufactured at Shawinigan Falls under the trade mark "Cellophane".'"

3952 Mr. TUBRIDY. The Government offers in evidence Exhibit 1144 appearing at page 1314. This is a letter from Mr. May to Canadian Industries Limited dated March 4, 1938.

(Letter from Mr. May to Canadian Industries Limited dated March 4, 1938, was received in evidence and marked "Government's Exhibit No. 1144.")

Mr. TUBRIDY. It reads:

"This letter will serve to confirm the cancellation, as of December 31, 1937, of our contract, dated November 1, 1933, relating to

the manufacture and sale of transparent cellulose sheeting in Canada."

The COURT. What page is this?

Mr. TURKUS. Page 3314. If you care to make a note, sir, that date, November 1, 1933, is Government's Exhibit 1157. That is the second line in the first paragraph.

Continuing: "The tri-party agreement dated December 1, 1936, * * *" that will be Government's Exhibit 1143. "* * * between our two companies, and Imperial Chemical Industries Limited, now becomes fully applicable to patents and processes relating to transparent cellulose sheeting; and, pursuant to the procedure outlined in your letter of September 27, 1937, all rights to which you are now entitled under this agreement with respect to such existing patents and processes will be deemed to be vested without the necessity of formal requests for and grants of such rights.

3953 "Article VIII (b) of the tri-party agreement contains the following provision:

"'Whenever any party desires to acquire rights hereunder for any invention which has been obtained by the grantor from others, such party shall reimburse to the grantor such portion of the consideration paid or payable for said invention as is reasonably attributable or allocable to the rights thereunder for the territory of such party.'

"The basic rights under patents and processes relating to transparent cellulose sheeting made under the Viscose process were originally obtained by us for North America from other parties. As the portion of compensation therefor which is reasonably allocable to the Canadian rights, we propose that you pay to us fifteen per cent of the net profits of C. I. L. from the manufacture and sale of transparent cellulose sheeting under the Viscose process for the period commencing January 1, 1938 and ending April 23, 1947.

"The net profits of C. I. L. from the manufacture and sale of said product shall be computed in accordance with the normal accounting methods employed by C. I. L., after deduction of such portion of the extra compensation fund accrued under its Bonus Plan as is applicable to its activities in the manufacture and

3954 sale of said product; but any change in the depreciation rates now used by C. I. L. in determining the amount of such net profits shall be subject to the approval of du Pont. Any net loss sustained in said activities during any period shall be carried forward and applied against the net profits realized during a subsequent period or periods.

"Payment of the compensation accrued during each calendar quarter shall be made to du Pont in lawful money of the Dominion

of Canada, payable at par in Montreal on or before the last day of the next ensuing calendar month.

"If this meets with your approval, please confirm the foregoing understandings by signing and returning the enclosed copy of this letter."

At the bottom, on the left side, appears, "Approved, Canadian Industries Limited."

* * * * * *

3968 The Government offers in evidence Exhibit 1148, dated April 13, 1931, appearing at page 1329.

(The letter from Mr. Jenney to Mr. Pickard dated as of April 13, 1931, was received in evidence and marked "Government's Exhibit No. 1148.")

Mr. TUBRIDY. This is to Mr. Pickard from the Foreign Relations Department. The caption is "Transfer of Canadian Cellophane Rights to C. I. L."

"Mr. W. S. Carpenter, Jr. told me he wanted the advice of the Foreign Relations Committee as to our obligations to C. I. L. on the above, particularly with respect to whether we are entitled to compensation.

"According to the first paragraph of Minute of March 2, 1929—

'It was agreed in the case of Canadian rights * * * that
3969 such rights should be granted free to C. I. L. provided they are wholly owned without prior commitment * * *', it would seem that we are obligated to turn the process over to C. I. L. without compensation.

"On the other hand, the Du Pont Company purchased this process from a third party, paying a substantial sum for it, and as a portion of this consideration was paid for the Canadian market, it would seem to be only fair that we should be reimbursed when we turn this over to C. I. L. In the event we did not own this process and we were opening negotiations for it, we would be obliged to acquire, if possible, Canadian rights, in the event C. I. L. expressed interest in our so doing. In this event, C. I. L. would bear the proportion of the total cost that the worth of the Canadian rights would be to the total. (Reference to this is made in second paragraph of Minute I of Minutes of Meeting of March 2, 1929, and Minute VII, Sub-Captions 1 and 8, October 12, 1928.

"Again, if the question of transfer of the Cellophane Process to C. I. L. had come up while the French still had their 48% interest in the Du Pont Cellophane Company, C. I. L. would have been expected to pay that portion of the total value of the Canadian rights that the interest of the minority in the Du Pont Cellophane Company was to the total. (See Minutes of March 2, 1929, second paragraph.)

"The Minute of March 2, 1929, in which we obligate our-
3970 selves to give C. I. L. rights to processes free-of-charge is not an obligation to C. I. L. at all and is entirely a partnership arrangement with the other major shareholder (I. C. I.). This expression of policy arose as a corollary to the I. C. I.-duPont General Agreement for the exchange of patents and processes. This general agreement, however, excluded Cellophane, Rayon and the Alkali Industry.

"Summing up, in answering this question there is the distinction between law and equity. A legalistic interpretation of the Minutes would require us to turn over our rights to C. I. L. free-of-charge. On the other hand, I feel that under the spirit of our relations with C. I. L. and I. C. I., we are justly entitled to compensation from C. I. L. for the cost of the Canadian rights to us.

"In examining this matter from the point of view of equity, we should bear in mind that I. C. I. offered C. I. L. their Ammonia Process free. This, however, is an industry coming within the I. C. I.-duPont Agreement, and one in which both I. C. I. and duPont would make contributions. Would I. C. I. turn in their Lightning Faster rights to C. I. L. free (this being a high profit specialty business, unrelated to the I. C. I.-duPont Agreement), and should we not ask them to do so if we turn in Cellophane?

"I would also point out that Paragraph II of the Agreement between E. I. duPont de Nemours & Co. and Arena Trading
3971 Corporation (on behalf of Soc. La Cellophane), June 9, 1923, states that neither party shall engage in the Cellophane business on the North American Continent, either as stockholder, principal or agent or in any other capacity, except through DuPont Cellophane Company, prior to December 31, 1935. In view of the exception made so that the French could take an indirect interest in the Sylvania Industrial Corporation, it seems scarcely possible that they will be able to oppose our action, even if they wished to do so; however, it would seem necessary to receive their formal approval."

The Government offers in evidence Exhibit 1149 appearing at page 1331.

(The minutes of a meeting held in New York on May 6, 1931, were received in evidence and marked "Government's Exhibit No. 1149.")

* * * * * *

4026 The Government offers in evidence Exhibit 1165, dated July 3, 1935, from Greville Smith to Mr. Jenney.

(Letter from Mr. Greville Smith to Mr. Jenney dated July 3, 1935, was received in evidence and marked "Government's Exhibit No. 1165.")

Mr. TURRIDY. It reads:

"Having been out of town, I have not been able to answer your letter of June 24th earlier.

"The Cellophane market in Newfoundland is, as you has supposed, entirely negligible at present and the potential is not at all interesting yet, though if greater use in the fishing industry were possible, considerable expansion of the market would occur. Total invoice value of sales of Cellophane in Newfoundland in the whole year 1934 amounted only to $1,444.

"We have made representations in the hope of having the duty from Canada reduced to the same as the British preferential level, but in the event that we do not succeed and sales are prejudiced, we shall no doubt suggest arrangements for importing duPont film into Newfoundland on the usual basis of purchase."

4027

The Government offers in evidence document 1171, appearing at page 1382.

(The letter from J. E. Hatt to W. G. Cuttle, dated August 30, 1935, was received in evidence and marked "Government's Exhibit No. 1171.")

Mr. TURRIDY. This is a letter from Mr. Hatt to Mr. Cuttle dated August 30, 1935:

"Your favor of August 24th, followed today by the receipt of your letter of August 29th on this subject, has had rather extended consideration among a number of us here.

"At present, Dr. Wallach is still in Europe and I believe he is expected home during the next week. It would seem inadvisable to discuss a matter of policy with any of his associates who really are without authority to act on a matter of this kind.

"I shall take occasion to ask him about their attitude toward Canadian business shortly after his return, when proper opportunity presents itself but it may be that you will want to give consideration to your own position in the trade in your country from a point of view of prices, delivery points, etc., as an additional preventative to this sort of competition."

The COURT. At that point, who is Dr. Wallach?

4028

Mr. TURRIDY. He is the president of Sylvania Corporation, sir, the only other company making cellophane in the United States at that time.

(Reading:) "The fact that your price is sufficiently high that they can pay the import duty into Canada and still realize almost the full American price renders the market very vulnerable to attack in this direction. Probably ultimately we shall have to litigate the basic moistureproof patents in Canada to prevent the importation of moistureproof material, and it is possible the cost of this to him, if engaged in, might be sufficiently high as to cause

him to give some consideration to withdrawing from that trade rather than engage in that expense.

"We have no way knowing what his attitude might be on this subject, but it is safe to assume as long as he can get practically the American prices less an Agent's commission for his material at the plant, he will be interested in holding that volume—particularly if that volume promises to continue to grow. Ultimately, unless we can develop a condition there where it is unprofitable for him to ship into Canada on account of the price situation in your country, we shall probably be obliged to engage in litigation.

"It might be well for you to consider whether or not the cost in dollars to you of such litigation would be such as to warrant your early consideration of a lower price on
4029 moistureproof in your territory.

"As regards plain transparent material, you have also the threat of Japanese and perhaps Italian competition to meet, and the Japanese, particularly, would be at prices substantially lower than your own."

At this point I would like to interject by calling your Honor's attention to the fact that the only competition that they would have to meet in Canada is Japanese and perhaps Italian.

Mr. GESELL. On plain cellophane.

Mr. TURRIDY. On plain transparent material.

Continuing reading: The Japanese quality is somewhat inferior, and so far as we know, their material is not available in rolls but for such trade as you may have in stock size and cut size sheets in P. T. material, their competition would be difficult from a price point of view.

"So far as we know, the Japanese have not offered any moistureproof material that was really moistureproof. From time to time we hear of a quotation on material offered as moistureproof but none of it that we have seen has any real moistureproof quality. On this account, and to prevent the establishment of any successful Japanese agencies, consideration of price revision would be very definitely in order.

4030 "If, for the moment, you are not ready to consider general price revision, you might consider whether or not it would be smart on your part to cut the price on seconds. These you limit to 35% of a customer's purchases and a 12% cut on seconds would only amount to 4% to that account, and as these are sold mostly to bakers, it would probably not amount to more than 1% to 2% of your over-all volume.

"Sylvania is willing to sell moistureproof material in this country, in rolls, at $.48 per pound less 10% to some of their agents—or at practically $.43 per pound as about their minimum level, and they are not keen to sell a large percentage of seconds here at this

level of prices because it reduces their average gross receipts on their sales and apparently their costs are such they do not care regularly, to take less than this kind of price for their goods.

With this as a basis of calculation, you can very readily figure what kind of price you might make that would substantially reduce their interest in Canadian volume and we believe your safety, not only in this instance, but in your future progress would be best served along this line of further price reduction—and particularly the consideration of a special price on seconds to such trade as buy heavily of your first quality material.

"I shall arrange to get what information I can on this
4031 situation at the first opportunity as I have indicated above.

In the meantime, I am setting this forth in this fashion for your consideration as to means of improving your competitive position thru an early price change.

"I will be glad to have your comments after you have had a chance to review this, and beg to remain

"Very truly yours,

"J. E. HUNT,
"*General Manager.*"

The Government offers in evidence Exhibit 1172, dated January 11, 1935.

(The letter from Canadian Industries Limited to Mr. Yerkes, dated January 11, 1935, was received in evidence and marked "Government's Exhibit No. 1172.")

Mr. TURNBULL. "Your letter of December 12th in regard to additional acetate plant capacity in Canada was very interesting to me and I may say that today I had a talk with the Stewarts about it. I am going to explore the situation promptly to see whether the peculiar situation of duty-conditions which now seems to be rising in Canada gives us a point d'appui.

"When Jasper Crane was up yesterday we had a talk in in regard to 'Cellophane' exports and I was delighted to hear from him today that in talking with you he gathered that should there
4032 be any orders for England and should our preferential duty position enable duPont to get as much out of C-I-L catering for the business (as a result of the 15% royalty payment and its sharing of our net earnings), you will—while naturally preferring to do the business yourself—bear in mind the desirability of letting C-I-L have the orders, since of course C-I-L would then get a benefit in addition to that enjoyed by duPont through its interest in C. I. L.

"With kind regards and best New Year wishes."

The Government offers in evidence Exhibit 1173, appearing at page 1387.

(The letter from Mr. Yerkes to Mr. Purvis, dated January 18, 1935, was received in evidence and marked "Government's Exhibit No. 1173.")

Mr. TURRIDY. This is a letter from Mr. Yerkes to Mr. Purvis, dated January 18, 1935:

"Dear Mr. Purvis:

"I have your letter dated January 11th.

"There are two questions involved it seems to me, in regard to the Cellophane orders for Great Britain. First, it doesn't seem possible to us that such a situation could arise as you have suggested, as clearly any extra poundage which we would get would help our over-all position. But secondly, and perhaps most important, are the definite contractual relations which govern this situation. If any eventuality should come along which
4033 would show a decided preferential position for du Pont, naturally we would consider this.

"I am glad to hear that you will explore the acetate situation. I haven't really very much faith in it, but thought it was at least worth while mentioning to you."

The Government offers in evidence Exhibit 1174, at page 1388.

(The memorandum from Mr. Smith to Mr. Purvis, dated September 21, 1939 was received in evidence and marked "Government's Exhibit No. 1174.")

Mr. TURRIDY. This is to Mr. Arthur B. Purvis from Greville Smith, dated September 21, 1939, headed "Cellophane for British 'Cellophane' Ltd."

"We have had in mind recently that B. C. L. might be required by the British Government to curtail production to conserve shipping space, and that consequently we might be called upon to help in the national emergency by exporting some film on their behalf to Empire market. It appears that this has now happened, as we had in inquiry from Mr. Hatt to our 'Cellophane' Division as to what quantities we might be able to export.

"On a previous occasion in 1937 when we did considerable export on behalf of B. C. L. during the time that they were increasing their plant capacity, we sold film to B. D. L. at 45¢ per
4034 pound, delivered on wharf at the Canadian port, including full over-head on the usual basis and shipment to the wharf, was 32.3¢ per pound and consequently the gross profit on the export business was 30%. The price we offered at that time aranged in consultation with the Du Pont 'Cellophane' Division was a satisfactory one to us and bore a relation to the alternative cost from the United States, on which material a duty of 20% was payable into Great Britain. We felt fully justified in taking a reasonable margin of profit as this was additional business for B. C. L. which they proposed to take away as soon as they had capacity of their

own. And in fact, they did so at the end of the year. On this export business from C. I. L., B. C. L. made an agent's commission, quite proper in the circumstances.

"The present circumstances are entirely different in that we understand B. C. L. has been compelled to curtail production by government order owing to the exigencies of war conditions. They are therefore requesting assistance from another Empire unit to try and maintain business which otherwise would go to non-Empire competition, with some possibility of it going to Japan as American material will be too expensive owing to duties and exchange. We suggest therefore offering to B. C. L. a price on an entirely different basis.

"Our present costs based on today's replacement raw ma-
4035 terial cost, exchange, etc. landed on wharf at Canadian port are 29¢ per pound. I would suggest for consideration as a transfer price to B. C. L. 36¢ per pound (against 46¢ previously), which would give C. I. L. a gross profit of 20¢. Or expressed on a cost plus basis, cost plus 25%.

"This proposal would give to B. C. L. some part of the manufacturer's profit as distinct only from an agent's commission recognizing the situation that this is not the normal case of supplying a company with inadequate manufacturing capacity for a temporary period, but helping an Empire 'Cellophane' unit to preserve its peace time business, and incidentally at the same time making some contribution to the Empire exchange problem.

"If this principle were acceptable to C. I. L. our proposal would be to advise B. C. L. that for as long as we have spare capacity and hence no need to make investment for their business, we are prepared to quote firm prices against firm quantities to be delivered over a period not exceeding three months, such prices to be based on current replacements, cost of materials at the time of receipt of the order (covering raw material) and the prices quoted from time to time to include a profit margin on the above basis. The margin would not of course be given to B. C. L., but firm prices would be quoted on this basis.

"Inasmuch as the suggested basis for sale to B. C. L. is some-
what different from that of an ordinary commercial trans-
4036 action, it may in your opinion raise question of policy, which you may wish to discuss with the Du Pont Directors before our 'Cellophane' Division discusses the matter with the Du Pont 'Cellophane' Division. Accordingly we are holding up a reply to Du Pont pending your advice on this matter and approval of the general proposal.

"Apart from the fact that this inquiry arises out of war conditions common to Canada and the United Kingdom, therefore in our view justifying special treatment, we believe there will be

quite important advantages to 'Cellophane' whether in the United States, Canada, or the United Kingdom, in our making every effort to insure that B. C. L.'s export trade is filled with 'Cellophane' and not with competitive film, thereby strengthening Japan's manufacturers or possibly Sylvania."

The COURT. Does that mean that B. C. L. would relinquish some of the territories allotted to it?

Mr. TUBRIDY. Yes, in fact, they asked, as indicated here—they asked the Canadian C. I. L. to send cellophane into their territories, it indicates there, and where they don't have the available shipping or for one reason or another such as remodeling their factory, they requested that this material be shipped into their territory.

Mr. GESELL. To them, isn't it, Mr. Tubridy? To B. C. L.

4037 Mr. TUBRIDY. To B. C. L.'s territory, yes.

Mr. GESELL. To B. C. L.

Mr. TUBRIDY. To B. C. L.

Mr. GESELL. B. C. L. bought it.

If your Honor please, this is the point I wish to make. This was not opening up any territory. This was simply B. C. L. buying for its own account to re-sell to its customers in its territory.

The COURT. I see, because they used the phrase there that B. C. L. wanted to maintain its customers and it had difficulty in seeing how they were going to maintain their customers in world trade if C. I. L. took the business in the foreign territory. But it is clear now to me.

Mr. TUBRIDY. That is one of the points that C. I. L. is making for getting this business so they will retain the territory for them after the war or after this emergency is over so that it won't go to Sylvania or to the Japanese. That is one of the arguments they are making here.

We are only too happy to maintain all along, sir, that they did maintain their territories. We aren't departing from that position at all.

(Reading:) "You will have noticed from current Division reports that Sylvania has made important inroads into the

4038 market in Canada with material produced in the United States, and any opportunity for Sylvania to extend still further their production by selling in markets left unsupplied by 'Cellophane' at marginal cost, would be still more to our disadvantage and also to that of Du Pont. The same applies to export by B. C. L. competitors in the United Kingdom, though we assume that they are in the same unfavorable position as B. C. L. by reason of government action.

"As far as supply is concerned we have considerable spare capacity at this time and could supply a minimum of 150,000

pounds per month, at any rate for the near future. Incidentally some part of this spare capacity is due to the fact that we have not been able to retain as large a share of the Canadian market as we had expected, owing to some loss of business to Sylvania, already mentioned.

"There is one further point which in a minor degree involves policy. On the previous occasion arrangements for export were arranged primarily via Du Pont as on this occasion. In the circumstances which now prevail we believe it would be advantageous to have the contact directly between B. C. L. and Canada for two principal reasons:

"1. Cable delays to our knowledge are considerable at the present time and as the volume of cable correspondence between the United States and the United Kingdom is no doubt considerably greater than between Canada and the United Kingdom, the
4039 probable delay in the censor's office will be greater. Furthermore, there may be more censorship of cables to a non-Empire than to an Empire country.

"2. Arrangements for exchange will have to be made by B. C. L. for any business transacted on their behalf, and it will probably be much easier to make such arrangements with another Empire country than if it appears that the arrangements for export are made with the United States, where the necessity for conserving foreign exchange is even greater.

"We would suggest, therefore, that in these circumstances it would be advantageous for the prompt execution of business that all arrangements be made directly between B. C. L. and C. I. L., C. I. L. of course keeping Du Pont fully posted on the business being done."

4040 Mr. TUBRIDY. The Government offers in evidence Exhibit 1175, letter dated September 25, 1939, appearing at page 1390. It is from Mr. Yerkes to Mr. Purvis.

(Letter from Mr. Yerkes to Mr. Purvis dated September 25, 1939, was received in evidence and marked "Government's Exhibit No. 1175.")

Mr. TUBRIDY. It reads:

"Cellophane for British Cellophane Limited."

"I discussed with Mr. J. Thompson Brown and Mr. John Hatt this morning your memorandum from Mr. Greville-Smith dated September 21st regarding the above.

"We all feel that under the present conditions it would be quite in order for you to supply B. C. L. whatever you mutually agree upon and to do this by direct negotiations.

"Mr. Hatt has discussed this with Mr. Greville-Smith over the telephone this morning and I am sure they are entirely in accord.

"As you have suggested, we feel it would be to our mutual interest to have you keep us fully advised as to your negotiations with B. C. I. By this we simply mean that we should like to be posted exactly as to what arrangements you come to with them in the matter of quantity, terms, deliveries, etc. etc.

"There is one other point upon which we are sure you will be in agreement, namely that this arrangement is to
4041 be a temporary one between du Pont and C. I. I. We suggest that it be definitely fixed at this time for a 6 months period. This can be renewed as conditions dictate, but we do reserve the full rights under our contract with you and this arrangement is in no way to be considered as a modification of the existing contract in the future.

"Under these conditions we are willing to make a definite arrangement for a 6 months period. (In case the war is over before that time the end of the war will be the end of the duration period.)

"Would you be good enough to let Mr. Hatt or me know that this is satisfactory to yourself, Mr. Greville-Smith and Mr. Cuttle?

"Yours very truly."

Exhibit 1176 is offered in evidence, which is a letter thanking Mr. Yerkes for his letter and for letting them supply British Cellophane Limited during this abnormal period.

(Letter from Canadian Industries Limited to Mr. Yerkes dated September 27, 1939, was received in evidence and marked "Government's Exhibit No. 1176.")

The COURT. Give me a minute, please. Proceed.

Mr. TURRIDY. I have offered Government's Exhibit 1176 in evidence, your Honor.

I offer in evidence Government's Exhibit 1177, appearing at page 1393.

* * * * *

4048 Mr. TURRIDY. These exhibits are for the purpose of displaying plant visitations. They kept each other informed.

Mr. GESELL. Constantly, every day; we can stipulate that.

Mr. TURRIDY. The Government offers in evidence Exhibit 1185, dated March 31, 1942, from Canadian Industries Limited to Mr. May.

(Letter from Canadian Industries Limited to Mr. May dated March 31, 1942, was received in evidence and marked "Government's Exhibit No. 1185.")

Mr. TURRIDY. It reads:

"Dear Mr. May:

"This will confirm the understanding reached at the meeting held in your office on March 18th; those present being Messrs. B. M. May, W. R. Swint, L. W. Haslett and H. S. Chandler.

4049 "It was agreed that we should attempt to make full use of our 'Cellophane' machines for the production of staple fibre; firstly, to produce fibre which would be useful in meeting essential national needs, and secondly, to recover some portion of the losses which must result from operating the 'Cellophane' plant at a restricted rate. It was further agreed that there was no objection to our proposal that we discuss the matter with Courtaulds with a view to arranging for them to handle the sales of staple fibre for the duration of the war, as long as such an arrangement did not extend beyond that period.

"It was understood that the matter of producing staple fibre on the 'Cellophane' machines is still in the experimental stage, but that fairly definite results should be available by the first of May, the present indication being that a reasonably satisfactory staple fibre can probably be produced on the 'Cellophane' machines.

"No mention was made of special compensation to the du Pont Company for services rendered in connection with the staple fibre business, but this matter was subsequently discussed with Mr. Thompson Brown who was of the opinion that a royalty on the profits from the sample fibre business should probably be paid to the du Pont Company in the same manner and for the same period

4050 as the royalty now paid on the profits of the 'Cellophane' activities. However, this matter was left for final decision if and when it is decided to go into the production of staple fibre on the 'Cellophane' machines at Shawinigan Falls.

"The whole matter is of course dependent to a very large extent on the conclusions of the experiments at Buffalo, but in order that no time may be lost, we propose to send an engineer to Buffalo at once, if agreeable to you, to get such details as are now available so that arrangements can be made to get into operation as quickly as possible. I would be glad if you would let me know if this is satisfactory to you.

"Preliminary discussion with Courtaulds confirms the need for staple fibre and indicates their probable co-operation in selling it."

Mr. GESELL. May I again inquire as to the materiality of these exhibits. There are a whole group of them here.

Mr. TUBRIDY. The last two? I just explained the last one, sir, and this is the reply to it. If I knew that Mr. Gesell would stipulate to these instead of suddenly coming up in the middle of reading an exhibit, we could have arranged something else.

The COURT. His question is this: What is the purpose?

Mr. TUBRIDY. Of which, sir?

The COURT. Of offering the exhibits.

Mr. TUBRIDY. The last one?

4051 The COURT. The last two.

Mr. TUBRIDY. To indicate plant visitations between these two companies, and they went and visited back and forth at each other's plants.

Mr. GESELL. As to staple fibre.

Mr. TUBRIDY. In a cellophane plant; staple fibre was a cellophane plant—competitors, your Honor.

The COURT. On the same product?

Mr. TUBRIDY. Sir, it is the cellophane machine they are talking about.

The COURT. I am talking about the product.

Mr. TUBRIDY. I am talking about the machine.

The COURT. Well, we are not talking about the same thing then.

Mr. TUBRIDY. That is right. He wants me to talk about staple fibre. I want to talk about cellophane machines.

The COURT. Well, he wants to talk about a product. How about you talking about the product?

Mr. TUBRIDY. If he asks me to do that, I say, I don't make a point of discussing the product at this particular point. What I am showing is that they allowed their engineers to visit back and forth between their factories, that they would know what was going on in each other's factories, would be completely aware of what was going on in each other's factories; they knew
4052 what adjustments were being made in each other's factories and what was going on with regard to cellophane machines. He wants me to talk about staple fibre. If I had known Mr. Gesell would stipulate as to plant visitations, that they went back and forth between the plants freely, I wouldn't have bothered with this.

Mr. GESELL. I will stipulate that we built their plants, we engineered them, we designed them, we determined what products they would manufacture, we supervised them and regulated them in all respects.

Mr. TUBRIDY. I didn't ask for all that. I just wanted to stipulate, did you have plant visitations going back and forth after the plant got built and after they were engaged in the cellophane industry, not if cellophane built their plant.

Mr. GESELL. I apologize to your Honor.

The COURT. That is all right. You go on, Mr. Tubridy.

Mr. TUBRIDY. If he wants to stipulate to that——

The COURT. Wait a minute. I had thought we ended. You go on.

Mr. TUBRIDY. I assure you I don't enjoy reading these, if I can find some other way of expediting it.

(Discussion off the record.)

(At this point a short recess was taken.)

4053 Mr. TUBRIDY. The Government offers in evidence Exhibit No. 1186 appearing at page 1408.

* * * * *

4065 (Letter from Mr. Prall to Mr. Yerkes, dated April 15, 1943, was received in evidence and marked "Government's Exhibit No. 1202.")

4066 Mr. TUBRIDY. Document 1187 is a letter from Mr. Smith, Patent Service, of duPont, to Canadian Industries Limited, in which he sends the necessary executed assignments transferring to C. I. L. title in the 40 Canadian patents which are listed in the attached schedule.

Mr. GESELL. Do we need all four lists of those patents? They are four lists of the same patents. Unless there is some significance to it, I should think one list would do.

Mr. TUBRIDY. No, sir. They are just duplicate lists attached.

Mr. GESELL. Can't you select one?

Mr. TUBRIDY. I believe we can take the top one.

Mr. GESELL. You mean you are going to offer page 1411 to 1418 of this, is that right, or 1411 and 1412?

Mr. TUBRIDY. Apparently what happened was that in transmittal of these documents they included some of these patents on some lists and left them off on the other list. So that although it appears as though they may be duplicate lists, actually they are not.

The COURT. Did some lists contain patents that the other lists did not contain?

Mr. TUBRIDY. Apparently, sir.

The COURT. Now, look at my problem when I come to read that. Am I going to read all these lists or are you going to mark a

4067 copy for me so that I will only have to read 40 patents in one list and not perhaps 160, then go to all that trouble to see if I am reading a duplicate——

Mr. MINICUS. If your Honor reads the first list, you will have substantially all the patents involved.

The COURT. Fine. Thank you.

Mr. GESELL. Can't we settle on the first list? Where counsel says 42 patents, the numbers don't mean anything, I suppose.

The COURT. I presume therefore, gentlemen, that I am to read the patents on the first list for the purposes of my consideration of the case?

Mr. MINICUS. Yes.

The COURT. Proceed, Mr. Tubridy.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1188, which is a letter from Canadian Industries to duPont acknowledging the executed assignments referred to in Government's Exhibit 1187.

This is a letter from Mr. Smith of the Patent Service at duPont to the Secretary's office, Wilmington, dated February 26, 1942, in which he states:

"Canadian Patents—Assignment to C. I. L."

"So that your file may be complete, we send you herewith the original of the C. I. L. letter dated February 19, 1942, together with the spare copy of our letter of February 12, 1942,
4068 originally sent to C. I. L. and returned by them, along with their acknowledgment of February 19."

Mr. GESELL. What is the materiality of this, your Honor? It is a letter of transmittal of the files. We have had a lot of them today. And once in a while I get restless, and I don't like——

The COURT. Well, you can get up and walk around. You ought to be grateful.

Mr. TUBRIDY. I think this is justified in this case. I have gotten a little bit ahead of myself. I just went over this batch last night and they are not fresh in my mind. I think the criticism of Mr. Gesell is justified.

Mr. GESELL. That is a very generous statement. I guess we better adjourn to straighten it out over the recess.

The COURT. I suppose you want to get your trains home over the weekend. Does that satisfy you, Mr. Tubridy?

Mr. TUBRIDY. Yes.

The COURT. Adjourn Court until Wednesday morning at ten-thirty.

(At this point the trial was adjourned to Wednesday, January 31, 1951, at 10:30 o'clock a. m.)

* * * * * *

4080 Mr. GESELL. Your Honor, I have not discussed until this moment any of the documents in Volume 10, which relate to C. I. L., and therefore I am going to try in these comments to deal with the entire group and at the same time to deal with some of the contentions advanced by the Anti-Trust Division on the legal issues involved.

There are two paragraphs of the complaint which focus the issues as to C. I. L. First there is paragraph 42 of the complaint, which your Honor will find on page 52 of the printed comparison, which states that duPont controls C. I. L. by reason of the stock ownership and that it has prevented C. I. L. from importing Cellophane into the United States and that duPont in turn has not exported to Canada.

The other paragraph is paragraph 39 appearing at page 48 of the print, which alleges that C. I. L., one of the co-conspirators, was a member of a world-wide cartel.

So we have two charges to meet on this evidence, which I think it is fair to say is substantially all of the evidence
4081 that the Anti-Trust Division is offering on the C. I. L. issue.

I would like to deal first with paragraph 42, the charge that duPont controls C. I. L. by its stock ownership and prevents C. I. L. from importing into the United States. That charge, of course, is the charge which has the most monopoly significance, because it is necessary to remind the Court from time to time as we go all around the world that we are concerned with a domestic monopoly charge.

4082 Now, the Government's position is stated at page 693 of the transcript. The charge is that "they"—I suppose they mean duPont and the co-conspirators—"set up a corporation up here that was to stay within their territories, and that was a method of maintaining a monopoly position on the part of duPont in the United States"; and the statement was repeatedly made that C. I. L. is supposed to compete with duPont. So the position of the Anti-Trust Division seems to be that C. I. L. was set up to bring about a further illegal division of territories as to cellophane, and that it was a method or means or keeping C. I. L. from selling into the United States.

Now, stated simply, your Honor, that is simply an attack on the basic duPont-C. I. L. relationship, and yet the Government has not presented any of the essential or undisputed background facts pertaining to C. I. L. Nothing is offered here as to what C. I. L. is, when it was organized, who owns the stock in it, what is the nature of its business, why is it in Canada? The record is silent on that, and all I can do is glean the facts from bits of evidence which are but an infinitesimal portion of the documents that the Anti-Trust Division has pertaining to C. I. L.

I state to the Court that the company was organized by duPont and I. C. I. in 1910, 14 years before duPont went into the Cellophane business. Document 1147 tells us that duPont and I. C. I.
own about 90% of the stock, and document 1143 says
4083 that these are separate holdings. Since 1147 says that the shares are held about equally, your Honor may take it from those two documents that duPont and I. C. I. own approximately 45% of the stock. In point of fact their holdings are a little less, nearer 42 or 43%. But there is no evidence on those facts offered by the Government. So we have a corporation organized in Canada, a Canadian company, by duPont and I. C. I. in 1910, and they each own roughly 45% of the stock on the evidence.

Now, who is the partner that duPont has in Canada in this company? It is I. C. I. and the documents show that I. C. I. is not a co-conspirator. There is no allegation that it is a co-conspirator. The documents show that it is not a manufacturer of cellophane—1143. So that C. I. L. is a company organized in Canada by duPont and another concern which is not even engaged in the cellophane business.

The documents show that both duPont and I. C. I. are represented on the Board of the company and participate in its management and operations.

Now, this company has been presented to your Honor in a very incomplete fashion. If you will turn to Government Exhibit 1143 at page 1302, you will see, commencing on that page and running for three more pages from 1302 through 1304, a long detailed list of products which are made by C. I. L. Only those products which are not marked with an asterisk are made by
4084 C. I. L. They are a manufacturer of coated textile, of plastics, of finishes of all kinds, of fertilizers, of insecticides, and many general chemicals as well as a substantial number of different kinds of explosives. Cellophane is but one of a whole host of products that this company makes.

The Court. How does cellophane appear percentagewise vis-a-vis these products in the total of C. I. L.'s manufacture?

Mr. GESELL. They would be very small. I don't know the precise figure. I can tell your Honor that the corporation is a corporation with assets in excess of $100,000,000 and sales running annually in excess of $100,000,000, and I can find for your Honor the precise amount of their cellophane sales which would give the measurement. I don't know it, but it is small. This company is in explosives, it is in nylon, it is in all of these general chemicals of every shape and description, and it got started as a venture in Canada 14 years before duPont entered the cellophane business.

I ask your Honor to turn now to 1159, which is the next exhibit after 1149 that the Government discussed. It appears at page 1349, and there is a statement by Mr. Lammot duPont which on the first two pages, commencing with the bottom of paragraph of page 1349 and going to the bottom of 1350, sets up in explicit terms the nature of C. I. L.'s relationship to duPont, and I want to go through that portion of the document with some care.

Mr. duPont says, "We regard C. I. L. as the ve-
4085 hicle of industrial effort for I. C. I. and duPont in Canada." He says, "The minority shareholders are merely investors.

At the top of page 1350, "The theory back of the C. I. L. operation, as far as I. C. I. and duPont are concerned, is expressed in the old saying: 'Canada for the Canadians,' meaning—the indus-

trial operations of the partners in Canada are intended to be conducted through C. I. L. C. I. L. was not set up to do anything else"; and that is the basis upon which it has functioned, he says. He says if that is true it naturally follows that C. I. L. will stay in Canada and will not spread out into other countries by laying down plants of exporting, and that I. C. I. and duPont will do their business through C. I. L.

Here, then, if your Honor please, is a clear statement of the partnership or joint venture concept underlying the formation and operation of C. I. L. This was determined long before cellophane came into this picture. duPont and I. C. I. set up C. I. L. to manufacture in Canada for the Canadians, and not to export, and it was an industrial venture by these two people for the purpose of conducting a Canadian business.

4086 If your Honor will turn back again to Exhibit 1143, which listed the products that we were discussing a moment ago, the so-called tripartite agreement, your Honor will see what this joint venture or vehicle concept involved.

This agreement which the Government has offered, dated in 1936, is but one of a whole series of agreements. Why they have offered this one particularly I fail to see. It recites on its face that there were earlier agreements in '25 and '26, and in fact there were agreements prior to that time. But this particular one is as good as any for my purposes because it sets forth clearly the concept under which C. I. L. functioned.

The COURT. What page is that on?

Mr. GESELL. 1298 is the first page, your Honor.

That document shows that both duPont and I. C. I. as part of this joint venture in the conduct of C. I. L. as an industrial partnership for Canada put into C. I. L. all of their patents and all of their know-how for cellophane and for all of these long lists of other products which cover the entire list of products in the chemical field that either duPont or I. C. I. make, with very few exceptions. And as this agreement indicates, it was their purpose to put all of their inventions into their subsidiary in Canada for the purpose of that company manufacturing and exploiting and developing the inventions and selling to Canada.

4087 We have in evidence, your Honor, this one little significant fact that sneaked through in these documents, Exhibit 1205, that C. I. L. has no research organization of its own. Stop to consider the significance of that for a moment in terms of this venture. Research, which we all recognize to be of tremendous significance in the chemical industry—the largest chemical company in Canada with assets in excess of $100,000,000, and it has no research organization of its own. Why? Because under these

agreements the parties were obligated to pour into their subsidiary the results of all their own research, all their patents, all their technology, send engineers up there to design the plants, train supervisors, as these documents show, give them chemists, give them sales help, train their supervisors.

4088 So here is a company functioning in Canada as the subsidiary of these two partners, in which they have a share of the profits and in which they invest all of their technology, all of their engineering resources for the purpose of making chemical products in Canada for the Canadians. This company has over thirty plants, your Honor, scattered throughout the country of Canada, including a cellophane plant. Now, who is it that says that these companies are supposed to compete or says, "This is illegal." That isn't the way to deal with an issue, if your Honor please. Why are they supposed to compete? Why is it illegal? are the questions that seem to me that should be presented, and as the cases have repeatedly, repeatedly said, a definite factual showing of illegality is required. Justice Brandeis said that in the Standard Oil case and it has been repeatedly cited. We don't make this venture illegal by saying it is illegal or by saying these companies are supposed to compete. Supposed by whom and why? And under what law and under what decision?

If I can just briefly sketch our position—and I repeat, your Honor, I am dealing with this question of C. I. L. selling into the United States, the issue suggested by the first paragraph I mentioned, paragraph 42. It would not be illegal for duPont and I. C. I. to form a company in the United States to make cellophane, even if I. C. I. had been a competitor in cellophane, which it wasn't. Vertical and horizontal combinations as they are called are an every-day occurrence. But here is a company organized long before this conspiracy or arrangement is supposed to have started, by duPont and a company that isn't even a competitor in cellophane, and moreover it is not even organized in the United States; it is organized in Canada, under the laws of Canada, subject to the supervision of the Canadian authorities, for the purpose of making and selling chemical products in Canada, not in the United States.

On the face of it it is a reasonable business venture, and these documents which were read with great tedium and at great length, all show normal, natural, every-day business
4089 occurrences, in the operation of this Canadian subsidiary.

What are the tests on which you must judge the C. I. L. venture? I think they are set forth by Judge Hand in the Aluminum case, 148 Fed. 2d at page 443. He says there are two tests, and I cannot be sure whether he says there have to be both or only

one, but let's assume he says only one of them need be met. He says, was the purpose illegal? And failing that, did it have an intended effect upon U. S. trade? Let's deal with those two issues on these documents.

First of all, was the purpose of C. I. L. illegal? Well, your Honor, we have not a scintilla of evidence as to the purpose, why it was formed, what the considerations were. There is nothing in the documents about it at all. We jump into the middle of it and try to present it as an independent company making only cellophane. There is nothing here at all to show the formation of C. I. L. was not a legitimate formation. There is no evidence as to illegal purpose. So we come down, I think, to the question of effect.

The COURT. Let me ask you this question, Mr. Gesell: Has any individual been examined pre-trial by deposition with respect to any of the documents falling within the duPont-C. I. L. relationship?

Mr. GESELL. No, your Honor, we have had no depositions at pre-trial of any kind.

The COURT. So for my purposes I must apply the
4090 judicial hazel stick to the silent documents to find the illegal purpose, is that correct?

Mr. GESELL. It seems to me so, your Honor. We have it from the Government that they have no witnesses on C. I. L.

The COURT. I see.

Mr. GESELL. They have given us under the pre-trial a list of witnesses and there is nobody on C. I. L., just their own economist, a fellow named Cook. So we know that these documents represent the C. I. L. case. And there is nothing here on purpose, except a continual showing in the document of a legitimate business enterprise carried forward in a straight-forward way.

Look what happened on trademarks. We ran through pages of trademarks, and in response to your Honor's question they said, "That is all legal, perfectly proper. We just want to show what happens between these companies that are supposed to compete." And again I say, supposed by whom? And why?

The COURT. Well, let us get to Judge Learned Hand's second point.

Mr. GESELL. On the question of effect.

The COURT. That is right, as shown by these documents.

Mr. GESELL. As shown by these documents.

Here is the situation that these documents show, as I see it.
duPont set C. I. L. up in business, in cellophane.
4091 It would never have been in the business without duPont's setting it up. What do the documents show? We trained their supervisors. We trained their plant people. We gave them

42 patents that were essential to the manufacture, including the basic moistureproof patent in Canada. We gave them the technical information. And through this subsidiary we conducted a Canadian business. So that we start off from the fact that without duPont setting C. I. L. up in business it never would have been in business, just as the company would never have been there if it had not been for duPont.

What about the effect? C. I. L. did not get into this business until 1931. That is the first agreement on cellophane and it really did not get going until about 1933. Well, what is the situation in the United States that the documents that we have already had offered show? They show that the moistureproof patent had issued to duPont, so that it would have been illegal to import any moistureproof cellophane into the United States because C. I. L. didn't have a license under that patent, and the patent could have been asserted to exclude it.

The documents also show, and I have called your Honor's attention to the statutes, a prohibitive tariff. They show that C. I. L.'s cost and sales price was away above duPont's, and yet on top of that we know that we have a tariff here of 45 per cent in addition to that.

Finally, what was happening in the United States?

4092 Production was going up and prices were going down. Sylvania had entered this market. And there is no showing of an intended effect or of an effect. The fact that we limited C. I. L. to Canada was a limitation of the joint venture unrelated to cellophane for the purpose of the conduct of a business up there, no intended effect of keeping cellophane out of the United States. We were circumscribing the way in which we were going to conduct this manufacturing enterprise with I. C. I. You have to have the intent, according to Hand, and that isn't shown. If we take it right up to the effect, we haven't got any effect.

So I say that on these documents there is nothing in this relationship which shows either the purpose or the effect or the intent, and that this was a lawful business venture conducted there, and that there is nothing that required C. I. L. to be a competitor of duPont in the United States market.

4093 I am sure your Honor appreciates if C. I. L. had sold here and we had come forward and said, "Look at these sales coming in which in some way dilute our monopoly," we would have been met with the statement, "But that is C. I. L.; that doesn't count; that is your own subsidiary." Well, who says a subsidiary has to compete with the parent under the circumstances of this case and the organization of this company?

As far as the claim of patent pool is concerned, which is another one of those sort of nasty words that is thrown around without

evidence, the documents the Government is coming to show that there wasn't a single C. I. L. cellophane patent that was ever used by duPont at any time in the United States. They will have to put those documents in. They are in their case.

The COURT. You have lived with this case longer than I have and therefore my recollection by far is not as competent as yours. Did any consideration pass from C. I. L. to duPont in connection, for example, with the forty some odd patents that duPont assigned to C. I. L.?

Mr. GESELL. Yes, C. I. L. paid 15% royalty, your Honor, for a number of years on the basic inventions, and the Exhibit 400 that was put in by the Government at page 5977 shows the amount of those royalties paid over a period from 1931 through 1947.

They ran from a high of $103,000 in one year and started
4094 out with a low of only $1,000 in the year they got started. I haven't totalled them, but they come to a fairly substantial sum.

I want to deal with the next charge, the question raised by paragraph 39, that C. I. L. is part of a world-wide cellophane cartel. Well, every time we try to come to grips with that, your Honor, we hear words like "whole picture," and "round-robin"; and I don't think that "round-robin" or "whole picture" prove a cartel and let us see what happened here, because here is a chance where we have a part of the case isolated to see whether or not there was a cartel.

I have to ask your Honor to return to the basic agreement, which is my continual assertion to the Court, and let us take a look at what that original agreement said, Exhibit 1002.

The COURT. Have you ever studied semantics, Mr. Gesell?

Mr. GESELL. No, but I have been a victim of semantics, your Honor, many times.

The COURT. Because you seem to shudder at certain words that semanticism affords.

Mr. GESELL. Under Exhibit 1002 it was provided that duPont had the exclusive rights to the patents and processes of La Cellophane for North America, and that is the starting point again, the basic agreement. North America, I think we are not
in dispute with the Government, included Canada and
4095 Newfoundland. If duPont licensed C. I. L. as it did for Canada and Newfoundland, it could only give C. I. L. the rights that Du Pont Cellophane itself had. It had no rights to those processes and inventions outside of North America, and it had licensed its inventions to others outside of North America under the basic agreement; so all it had to give C. I. L. was what it itself had been able to get, which were the rights for Canada and Newfoundland, and so the sub-license was made and we find

right at the initial outset of it in Exhibit 1149 Mr. Yerkes explaining the La Cellophane agreement in these terms to C. I. L.: It obligates duPont to withhold all information on cellophane from any company operating in the territory reserved for the French company—telling them that all we can do is give you the rights that we ourselves have—Exhibit 1002.

If I may digress for a moment, let us see whether these documents show that duPont was thinking in terms of cartel obligations or technical patent license obligations. The first thing that came up was C. I. L. saying, "Look, we think maybe we could sell in France and it will give us a little more capacity here as we are getting started"; and twice Exhibits 1154 and 1158 show that duPont said, "That is O.K. with us, but we don't think the French will give it to you. We have not been able to get it from the French and we don't think the French will give it to C. I. L."

But we did say, "Look here, don't you sell; we have a territorial arrangement and cartel here and you are not supposed to go over to France"? We say, "We don't think the French will give it to you, but it is all right with us." 4096

And similarly, when the question came up of shipping to B. C. L. and the war got going and there were questions of Canada helping Great Britain in the war effort—1174—we said, "Go ahead and chip into the British territory if you can work out a deal with B. C. L. We don't care." Those again are just tidbits. Doesn't that show we were not trying to preserve a territorial arrangement with a whole host of companies? All we were trying to do was to preserve our obligations and our rights under the basic contract, and the French had to agree to our licensing C. I. L., because they still sat on the Board of Du Pont Cellophane when this arrangement was made, and they, too, were keen on seeing that the basic agreement was preserved. As to why we licensed C. I. L., that comes clearly out of the tripartite and other contracts. We were obligated to manufacture in Canada through C. I. L. as soon as the local market was ready for local manufacture. That was the basic vehicle concept under which C. I. L. functioned, and it ran by the terms of the tripartite agreement, Article 14 of 1143, to our subsidiaries. So we were obligated to give these rights under an arrangement made in 1910, and we did it within the strict confines of the basic agreement. If there was any doubt that this was a technical agreement, we have it from the Government's evidence that there was a substantial number of patents licensed, 1187; we took a royalty on the rights, 1144; we made clear that the information could not go to I. C. I., because they were not entitled to it, in 1149; and again we get an indication of the importance of these rights, because, as the exhibits show, this payment of 15% of the profits resulted from a valuation of what we 4097

had had to pay for rights in Canada at the time of the basic French agreement, and C. I. L. recognized the worth of those rights by the substantial I have mentioned.

The COURT. Will the record show in the price lists, which I suppose will come in later, whether C. I. L. could have competed with duPont in the United States on the basis of what they were getting for their product?

Mr. GESELL. They would if the Government would offer those lists, but they are not offering them, your Honor. They are not offering C. I. L.'s price lists. We do have one document in here which meets the proof I think sufficiently to make it clear that they could not. That is No. 1171.

The COURT. That they could or could not?

Mr. GESELL. Could not have. 1171 shows that as of the date of that document, 1935, the price in Canada was comparable to the United States price plus the duty. In other words, they were selling in Canada at around 64 cents a pound, according to Exhibit 1171, when at the same time duPont and Sylvania were sell-
4098 ing in this country at 43 cents a pound, and of course if they came over the tariff wall this way they had to pay 45% on their 64-cent price. So I think it is clear from what evidence we have that they could not have competed here. If the Government offers the list, that will be even clearer.

There seemed to be something sinister here in the fact that we passed on C. I. L. information to the French. That is where the round-robin came in, your Honor. We passed that information on because we were obligated to under the basic contract 1002, and that is all there is to that. If we had manufactured ourselves up there in our territory we would have had to do it, and the contract specifically provided in Article 4 that we would have to do it in a situation like this with C. I. L. So I say that all these documents show on this charge of a world-wide cartel is the strict, businesslike implementation of the technical agreement 1002, and nothing more.

You don't see C. I. L. sitting down at meetings with representatives from abroad; you don't see discussions about a whole group of foreign concerns. This was simply the implementation of a technical agreement and duPont's businesslike dealings with its own subsidiary in which it had a 45% share of the profits, plus a 15% royalty of the profits of this enterprise.

The charge is also that we did not export to Canada in competition with C. I. L. We sold through C. I. L., your Honor, all our products, particularly the product that C. I. L. itself was
4099 making. They acted as duPont's exclusive distributor for goods in Canada. We sold some cellophane to Canada. When they got started in local manufacture we stopped and

supplied the market through C. I. L. up there. What the bearing of that is on a monopoly case I can't see.

And what is improper about having a company in which you have a substantial stake your exclusive distributor I can't see when that company is a company formed not in conjunction with other cellophane manufacturers, but with a chemical concern not involved in cellophane at all? That is why Stewart, the agent who is mentioned in some of these documents, was given up and C. I. L. undertook the business, and it is clear from the documents why they did that. They did it to feel out the market and get experience with the market preliminary to local manufacture, Exhibit 1149—again a reasonable, businesslike thing to do.

Then why should we advise them of our price reductions? There are some documents about that at 1179. We did advise them about our price reductions. They were our distributor and we told them about them; we told them about them ahead of time so that their price situation up there could be adjusted if necessary to the price situation in the United States. To give that an aura of price-fixing, which must be the suggestion that results in the documents being offered, is again to overlook the basic relationship; and why
4100 the Government has kept out of its evidence who the directors are, what the shareholdings are, how the company is organized, what it makes, I fail to know.

Well, I have already discussed the trademark, I have also discussed the close cooperation on research which grew out of these contracts, and I think there is no need to discuss any other phase of the evidence unless your Honor has some questions.

* * * * *

4104 (At this point a brief recess was taken.)

Mr. GESELL: Your Honor asked what percent of the Canadian sales of C. I. L. were attributable to cellophane. I didn't have the answer, but I have obtained it and am informed that in 1948 C. I. L.'s sales of cellophane amounted for 5.16% of the company's total sales.

Since we are starting a new section and have come to the end of the first segment of it, I think it might help if I focus our position as to the issues which we understand are intended by this section. This relates to a wholly different product than Cellophane. I think the best way I can demonstrate that to the Court is to hold up here for a moment cellophane, the commercial product, made in roll form, moistureproof cellophane. This is the way it is made (indicating). And now I show your Honor what a band is. They have to be shipped in water and are not too easy to handle. But that is a cellulose band.

Mr. MINICUS. Does Mr. Gesell claim that they are chemically different, your Honor?

Mr. GESELL. That is what I am going to turn to for a moment, your Honor.

As far as caps and bands are concerned, duPont does not
4105 make caps at all. It went out of the cap business before the complaint was filed. I doubt if the Government charges that we have a monopoly of caps. They are made 100% by another company that we have no interest in named Celon.

The COURT. What do you mean, made 100%? Do they have a monopoly?

Mr. GESELL. They make 100% of them, yes.

This product bands relates back to viscose, and I suppose that is what Mr. Minicus has in mind when he talks about the chemistry. Let me point out for a moment where we are on that issue, since he has raised it. Rayon, which starts with visvose, is not in the market or in the field or in the case, but cellophane is. Sponges which are made from viscose are out of the case, but bands are in, although bands and sponges are made at the same plant by the same technicians side by side. So we have to, I think, to determine the question of the relevance of this cap and band phase, to look not at the chemistry, but to come back to the question of the market.

Now, caps and bands are certainly sold for different purposes and different uses in different ways and in different markets than Cellophane. A band is used on the top of bottles as a secondary closure.

The COURT. That is the band?

Mr. GESELL. The band is used as a secondary closure. It com-
petes in the market place with tinfoil caps, aluminum caps, gel-
atine caps, and other closures with which your Honor and
4106 the public generally recognize are used on all kinds of bottles, perfume bottles, liquor bottles, every kind of bottle that has to be sealed. Now, these bands do not compete with cellophane and they are not sold to the food-packaging markets, and I suppose that the reason that Celon with 100% of the caps is not involved in the monopoly case, to take up your Honor's suggestion, is because of that very fact, that Celon is meeting heavy competition ——

The COURT. Oh, I wasn't making a suggestion. I don't assume the functions of the Attorney General. It was just a matter of inquiry with me.

Mr. GESELL. I assume because they are busily competing in a very highly competitive market.

Mr. MINICUS. I think it should be made apparent, since these suggestions have been made, that Celon's monopoly happens to be the kind that Judge Learned Hand was speaking of in the Aluminum case where all the others dropped out of the business and it became the passive beneficiary of a monopoly in 1947, just a few months before the complaint was filed.

Mr. GESELL. We must then in our view consider bands, your Honor, as a separate and distinct product, and if we are to be charged with monopolizing bands we must look at the market in which it is sold and at products it competes with, and this opens up, therefore, in our view a wholly different and separate case from the cellophane case, and you don't cross that
4107 bridge simply by saying sponges are out because we like to have sponges out, but bands are in because it helps our statistics.

Mr. MINICUS. Is Mr. Gesell asking that we amend our complaint to include sponges? If so, I would like to ask him for duPont's representation in the sponge market.

Mr. GESELL. You have already done so. At pre-trial you have said that sponges are not in this case by a specific order entered in this case.

Mr. MINICUS. Then why are we discussing that so much, your Honor?

Mr. GESELL. I am pointing out, your Honor, before I was interrupted, bands and sponges both have comparable origins in viscose technology, they are different products, and both of them are different from cellophane, and that you can't make a statistical case by deciding for your own purposes what is in and what is out of the field or what is out of the market.

Now, there are three manufacturers of bands—duPont, Sylvania, and Celon. DuPont has about 63%. These documents that we are coming to are concerned with the question of foreign arrangements. Presumably the importance of them is the question of imports; that by some arrangements which the Government contends were entered into, which the documents, your Honor, will show lasted for not more than three months, imports of bands were kept from the United States.

There is a 60% tariff on bands which existed since
4108 1922, and no bands have ever at any time, either before we acquired Capes-Viscose or after, been sold over the tariff wall of 60%. Not only was there a 60% tariff wall, but these bands have to be shipped in water or other liquid, as your Honor may have observed from this bottle, because otherwise they become hard and stick and they are difficult to transport. So we say that this phase of the case that we are now going into is something wholly separate and distinct from any cellophane case, and that the Gov-

ernment cannot show either that we have a monopoly, because our percentage of bands is low and because bands compete with many other interchangeable substitutes in the market place, and as far as this foreign situation is concerned, which is mostly a tempest in a teapot, when you get all through the documents it had nothing to do with imports, because imports never have and never could have taken place.

The COURT. Am I to understand that the use of the word "bands" is synonymous with "caps"?

Mr. GESELL. No, your Honor.

The COURT. Why are both caps and bands thrown into this category together if there is a distinction put on them?

Mr. GESELL. Except they are both closures, is the only way I can see why they are put together. It is a word of art the Government has developed in the complaint, but does not show the fact that they are separate products. A cap, your Honor, fits
4109 over the top of the bottle and is a tube sealed at the end. A band, as your Honor saw from this, is open on both ends and goes over a primary closure, and is a secondary closure that holds the primary closure on. They are two separate products.

The COURT. Did you want to say something, Mr. Tubridy?

Mr. TUBRIDY. The point is Mr. Gesell said it was a word of art developed by the Government in this case. I call your Honor's attention to the fact that it is a word of art that is used in the industry, as the documents will show.

The COURT. What is?

Mr. TUBRIDY. Caps and bands. The industry uses them together.

The COURT. With that background discussion let us proceed with the exhibits.

Mr. TUBRIDY. Yes, sir.

* * * * *

4110 something which we thought we had already bought under the original contract, namely the exclusive territorial rights over here.

"It is my own feeling that this matter is not nearly as important from a practical standpoint as it is from a theoretical one, but in view of the facts I think we are asking little enough when we desire that all of South America be left as open territory.

"Will you send a copy of this to Albert, or shall I write to him, or what shall we do?

"Yours very truly."

The COURT. Going back to the fourth from the last paragraph, Mr. Tubridy, where the phrase is used that Capes-Viscose of Paris could not build or come into this market, what does the author of the letter mean, according to your interpretation?

Mr. TUBRIDY. My interpretation is that this market, he means the United States——

The COURT. Market for what?

Mr. TUBRIDY. Market for caps and bands.

The COURT. Consisting of what product? A cellulose product?

Mr. TUBRIDY. Caps and bands are a cellulose product.

The COURT. Cellophane?

Mr. TUBRIDY. It is made from the same basic material that cellophane is made from, and they are talking about the market in caps and bands in what they consider their territory, that is, North America.

4111

The COURT. You see, for two weeks you have had my eye focused on this question of cellophane, and we started with the origin of the French company and we have traced that all through, and now I haven't got quite into focus yet the use of this term "caps and bands."

Mr. TUBRIDY. Well, sir, the complaint makes two charges, one on cellophane and one on caps and bands.

The COURT. I see. So that it is not cellophane qua cellophane, which is the only commodity under attack, but it is cellulose products?

Mr. TUBRIDY. It says, cellophane and caps and bands.

Mr. MINICUS. There are other products that are cellulosic products. As Mr. Gesell said today, rayon is very similar, as well as these sponges which employ the yellow color. They are all cellulosic products. In fact, they are all within that group called regenerated cellulosic products. There are other products, cellulose acetate, which is made by another method than the cellulose product. For the purpose of this case, cellophane is the largest product we are talking about. But joined with that we have charged monopolization in the manufacture of these caps and bands, which my understanding is, and I think subsequent proof will show, is virtually identical with cellophane except for the fact that instead of being extruded from a long narrow slot in a sheet form, it is extruded from an annular nozzle so that it comes out as tubing, particularly as to bands. Caps are slightly different, and they are made, inasmuch as they are closed at one end, by a dipping process that forms on a process so that the end is closed. That product has become extremely unimportant in commerce. The bands are still quite a large product in commerce, particularly in the liquor industry. The bands are quite an important product, and they are extruded in an endless tubular form and then cut, and we say that except for the difference in the form they are virtually the same product. I think the relationship is much closer between caps and bands

4112

and cellophane than cellophane and sponges or cellophane and rayon.

The COURT. So that this morning we have virtually opened a new chapter?

Mr. MINICUS. That is correct.

The COURT. This is another series of agreements which you claim are violative of the acts in question.

Mr. MINICUS. That is right.

* * * * *

4116 THURSDAY, FEBRUARY 1, 1951, 10:30 O'CLOCK A. M.

Present: As before noted.

Mr. GESELL. If your Honor please, I would like to hand up at this time defendant's trial memorandum No. 1, which is a reply to the plaintiff's memorandum on one of the documentary evidence questions which we discussed yesterday. I handed copies of this to the Government, and I hand two to the Court.

There is one other matter I would like to mention while I am on my feet. The Court will recall that yesterday at the close a question was directed to the Government as to why in the handling of the caps and bands situation the duPont lawyers had been so zealous to watch anti-trust implications in contradistinction to the way in which the other agreements appear to have been handled that we have been discussing earlier. I feel I should state to the Court that I have in my possession two letters which the Government does not have copies of, one dated October 9th from Dr. Sparre to Judge Gregg, written in handwriting from the Ile de France, inquiring concerning the reasons for the cancellation, and Judge Gregg's reply of October 24th to Dr. Sparre. Both Dr. Sparre and Judge Gregg are dead.

I would be glad to hand the Government copies of these
4117 documents which pertain to your Honor's question if they are interested in seeing them.

Mr. TUBRIDY. Your Honor requested that the Government indicate the corporations and companies involved with regard to this, your Honor, so that it might be made a little easier to follow the line of the evidence and the line of the cases. In that connection we have made some copies which gives an outline in a graphic indication of the various corporations involved with regard to cellophane and the companies involved with regard to caps and bands.

The COURT. This is what I had in mind, Mr. Tubridy. Thank you very much. I am one of those individuals who get things quicker through the eye than by the auditory functions.

Mr. TUBRIDY. I will take just a few moments to indicate what the arrows mean. I am not going to be expansive with it; I am

just going to give some indication so you can follow it. In other words, it is not a complete, formal chart; it is for your Honor's guidance.

La Cellophane is in the center, and an arrow runs back and forth between Kalle and La Cellophane, which means that they were exchanging patents, licensing and exchange of information, and so forth. Similarly, with regard to La Cellophane——

Mr. GESELL. Your Honor, may I inquire, without interrupting Mr. Tubridy, what date we are talking about on
4118 this chart? I mean as of what time? These are changing relationships.

Mr. TUBRIDY. I can supply that, your Honor. The date starts as of the time that the contract was made between Kalle and La Cellophane. It was in existence—I can easily check back by the licensing agreements which have been put in evidence. There is nothing in here that is not already in evidence. I am not testifying in connection with it.

Mr. GESELL. There is no Kalle-La Cellophane agreement in evidence so far as I am aware, Mr. Tubridy.

Mr. TUBRIDY. There have been indications back and forth in the letters of Comptoir all through that they licensed Kalle and they set forth Kalle's territory, your Honor.

The COURT. Let me make this suggestion: Sometime during a morning or afternoon recess or luncheon recess, or at the end of the day's session, will you take off five or ten minutes with Mr. Gesell and see if you can come to some common understanding as to what date should be inserted? You don't have to re-photostat this; just put the date in in pen and ink.

Mr. TUBRIDY. I will be very happy to, your Honor.

* * * * *

4123 Mr. TUBRIDY. The Government offers in evidence Exhibit 1277, a letter from the Director of British Cellophane Limited to E. I. duPont de Nemours & Company, dated February 6, 1941.

(The letter from L. R. Armstrong, Director, British Cellophane Limited, to Messrs. E. I. duPont de Nemours & Company, dated February 6, 1941, was received in evidence and marked "Government Exhibit No. 1277.")

Mr. TUBRIDY. It states:

"In further reference to your letter of the 17th October last, and to the question as to the existence of territorial limitations under our agreements with your Company relating to regenerated cellulose film, we have lately received Counsel's Opinion in regard to this matter, according to which Counsel sees nothing, under the contracts, to prevent our selling to parties in your territory

therein defined, subject to any difficulty in regard to patent or trade mark rights.

"We believe that this Opinion accords with the
4124 view set out in your letter of the 17th October last, and is subject to the same qualification, namely, that any such sale is subject to such limitation as may lawfully be based upon the unauthorized use of patented inventions or trade marks in the country of manufacture, use or sale.

"Referring to the final paragraph of your letter, this letter also is not intended to modify any of the provisions of our agreements involving the exchange of technical information."

The Government offers in evidence Exhibit 1278, a letter from Mr. May to the Executive Committee dated March 17, 1941.

Government's Exhibit 1278

(The letter from Mr. May to the Executive Committee, dated March 17, 1941, was received in evidence and marked "Government's Exhibit No. 1278.")

Mr. TUBRIDY. It is captioned "Cancellation of Foreign Technical Agreements Relating to the Manufacture of Viscose Rayon Yarn, Regenerated Cellulose Film and Shrinkable Caps and Bands.

"We submit herewith as Exhibit A, a copy of a letter recently received from the Comptoir, our French rayon associate. From the references in the first and third paragraphs of this letter, we interpret it to apply not only to the viscose rayon agreement, but
4125 also to our agreement with La Cellophane on regenerated cellulose film and with Societe de la Viscose Francaise on cellulose caps and bands. These companies are associated with the Comptoir group.

"We see no alternative than to agree to the cancellation of these agreements. The situation has been discussed with the Legal Department who have drafted a reply, attached as Exhibit B. If these agreements are cancelled, the only broad technical agreements on Continental Europe affecting the Rayon Department, aside from the nylon agreements, will be the Rhodiaceta acetate rayon, Rhone Poulenc cellulose acetate (French), and the Kalle (German) regenerated cellulose film agreements.

"Inasmuch as Kalle informed us last October that the German government had not allowed them to transmit technical information since the outbreak of the war (nylon information has been received from the I. G. during this period), and since the Kalle agreement was consummated in connection with the La Cellophane agreement, this seems an opportune time to cancel this agreement.

A proposed letter to Kalle, prepared by the Legal Department, is attached as Exhibit C.

"Although it appears from the Comptoir's letter that there later may be demands made upon them to enter into Technical arrangements in connection with the manufacture of other products, this has not yet occurred in connection with the manufacture of cellulose acetate or of acetate rayon, presumably because
4126 none of their plants are in occupied France. It is proposed to take no action in connection with these agreements. We shall transmit information as legally obligated and as permitted by Governmental regulations. U. S. Treasury Department regulations prevent the payment of royalties.

"If the French agreements are cancelled, our British associates, British Cellophane Ltd. (regenerated cellulose film) and Viscose Development Ltd. (cellulose caps and bands) will be informed of their cancellation to prevent any of our information from being transmitted via them in the event that their technical exchange has not already been terminated. Ducilo has already been instructed not to transmit information direct to the Comptoir.

"Authority is requested to agree to cancellation of the Comptoir viscose rayon, the La Cellophane regenerated cellulose film and the Societe de La Viscose Francaise cellulose caps and bands agreements, and to cancel the Kalle regenerated cellulose film agreement per the attached letters. The question of resuming these relationships will depend upon the considerations obtaining in the future."

4127 The Government offers in evidence as part of Exhibit 1278 letter from the Comptoir des Textiles Artificiels to du-Pont dated 31 December, 1940.

(Letter from Comptoir des Textiles Artificiels to Messieurs E. I. duPont de Nemours & Co., dated 31 December 1940, was received in evidence and marked as part of "Government's Exhibit No. 1278.")

Mr. TURNBIDY. It reads:

"We wish to bring to the knowledge of your company the following facts, the consequences of which are of a nature to modify, without any voluntary intention on our part, the technical agreements existing between your company and our group in the field of viscose yarns and fibres and that of transparent papers:

"1. A certain number of our plants located in the zone occupied by the German Armies are under the obligation to receive the visit of military or civilian delegates designated by the German authorities.

"2. Under the auspices of our government and of the occupying authorities, and within the limits of the professional organization instituted at the present time in France, we have been brought, together with the other concerns carrying on in-

France the manufacture of viscose yarns and fibres,
4128 to conclude technical agreements with a German group.

"Under those conditions it is not possible any more for us, in what concerns viscose, to conform to the provisions of our technical agreements.

"While communicating this news to you we want to tell you once more how happy we have been to conclude those agreements with you, and how much it has been agreeable for us to pursue during all these last years the technical collaboration which we have had with your various divisions. It is only the present circumstances that oblige us to renounce to such collaboration.

"Please agree, dear sirs, the expression of our best sentiments."

The COURT. Should that be "agree" or "accept"?

Mr. TUBRIDY. (Reading.) "Please agree, dear sirs, the expression of our best sentiments." It is written by a Frenchman, and he probably has a little trouble with our language as we would, I suppose, with theirs.

Mr. GESELL. This is a translation.

The COURT. That is what I thought. All right, go on.

Mr. TUBRIDY. The Government offers in evidence proposed letter, still part of Exhibit 1278.

(Proposed letter to Comptoir des Textiles Artificiels, undated, was received in evidence and marked as part of "Government's Exhibit No. 1278.")

4129 Mr. TUBRIDY. It reads:

"Proposed letter. Date (blank).

"Comptoir des Textiles Artificiels, 23, Place Tolozan, Lyon, Rhone, France.

"Gentlemen:

"We have received your letter of December 31, 1940 in which you stated that under present conditions, it is not possible for your company and its associated companies to conform to the provisions of our technical agreements, relative to the field of viscose yarns and fibers and that of transparent papers. We assume that, in addition to our technical agreements with Comptoir and La Cellophane, your letter also covers our technical agreement with Societe Francaise de la Viscose in the field of tubular pellicles for bottle seals and the like.

"We accept the situation as you have stated it and will consider our technical agreements in the aforesaid fields with you and your associated companies to be terminated.

"We wish to offer you our regret that force of circumstances has compelled this action to be taken.

"Yours very truly."

The COURT. Was that the letter prepared by the Legal Department which was referred to in the report to the Executive Com-

mittee? Back in Government's Exhibit 1278 there is some reference to a letter which was prepared

4130 Mr. TUBRIDY. It is indicated to be Exhibit B, sir, which is an attachment to this letter of May to the Executive Committee. So I assume that is what they do have reference to.

Mr. GESELL. Yes, your Honor, this is the letter.

The COURT. That is what I thought.

Mr. TUBRIDY. That is indicated to be Exhibit B.

The next attachment is "Proposed Letter. Date (blank).

"Kalle & Co. A. G. Wiesbaden-Biebrich, Germany.

"Gentlemen:

"Your recent correspondence with us, and particularly your letter of October 2, 1940 has notified us of your inability to fulfill the obligations of your technical agreement with us in the field of regenerated cellulose wrapping tissues and the like.

"We consider our technical agreement with La Celiophane to be terminated, due to existing conditions, and must also take the same attitude with respect to our agreement with your company in view of your inability to carry out the terms of the agreement. Although we consider our agreement with your company to be terminated, we are sorry that present-day conditions have brought an end to a relationship which has been to our mutual benefit."

The Government offers in evidence Exhibit 1279, which is a letter to Mr. Raskob from Mr. DeRight.

4131 (Letter from Mr. DeRight to Mr. Raskob dated March 26, 1941, was received in evidence and marked "Government's Exhibit No. 1279.")

Mr. TUBRIDY. It reads:

"We send you herewith for filing with the technical agreement dated January 1, 1930 between Societe de la Viscose Francaise (formerly Societe Francaise des Crins Artificiels) and DuPont Cellophane Company:

"1. a translation of a letter dated December 31, 1940 from the Comptoir des Textiles Artificiels advising us that they can no longer conform to the provisions of our technical agreements relating to products from viscose (The original letter is filed with the agreement between the Comptoir and the DuPont Fibersilk Company of December 26, 1923.); and

"2. a copy of Mr. Yerkes' letter of March 26, 1941 to the Comptoir agreeing to the cancellation of our several agreements including that with La Cellophane.

"Authorization to proceed as above was granted by the Executive Committee by its resolution of March 19, 1941. As a result of this exchange of letters this agreement is now cancelled.

"Copies of (1) and (2) are enclosed for recipients of copies of this letter.

4132 "Please acknowledge receipt of these documents by returning the duplicate copy of the letter."

Then we have attached thereto the letter of Mr. Yerkes to the Comptoir des Textiles Artificiels dated March 26, 1941, which reads:

"Due to existing conditions, we understand that it is not possible for your company and its associated companies to conform to the provisions of our technical agreements, relative to the field of viscose yarns and fibers, the field of transparent papers, and the field of tubular pellicles for bottle seals and the like. In view of this situation, we consider our technical agreements with Comptoir, La Cellophane and Societe de la Viscose Francaise to be terminated.

"We wish to offer you our regret that force of circumstances has compelled this action to be taken."

The Government offers in evidence Exhibit 1280, which is a letter from DeRight to Mr. Raskob dated March 26, 1941.

(Letter from Mr. DeRight to Mr. Raskob dated March 26, 1941, was received in evidence and marked "Government's Exhibit No. 1280.")

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4134 The Government offers in evidence Exhibit 1281, which is a letter from Kalle & Company to duPont dated October 2, 1940.

(Letter from Kalle & Company to duPont dated October 2, 1940, was received in evidence and marked "Government's Exhibit No. 1281.")

Mr. TUBRIDY. It reads:

"We duly received your letter of August 27 and hasten to inform you, that we have not sent any report to you since August 1939. This on account of the present European situation, which makes it rather difficult for us to send confidential informations on a safe way. Furthermore our staff is very occupied with other things and therefore does not find the time to deliver the reports in question.

"On the other side we have to do our best to keep our present production up to date and we are therefore not in a position to make greater experiments and researches, so that our reports would be rather meagre and would not contain things interesting for you.

"In view of this situation we think it the best way that we stop the sending of reports so long as the present state of affairs exists

hoping that the time is not far, that we can take up again
4135 the mutual exchange of informations which have proven so helpful, necessary and valuable for the improvement of the Cellophane production."

"We trust that you will understand our present situation and that you will continue to send your interesting reports to us. As mentioned above we hope that the present situation will change soon and that was the reason, that we did not inform you of the present impossibility to carry on with the exchange of information, though we have continued the exchange of patent applications. You can be sure that we will do all we can to send you again our reports as soon as the circumstances do allow it.

"In the meantime we remain very truly yours."

The Government offers in evidence Exhibit 1282, dated March 26, 1941, from Mr. Yerkes to British Cellophane Limited.

(Letter from Mr. Yerkes to British Cellophane Limited dated March 26, 1941, was received in evidence and marked "Government's Exhibit No. 1282.")

Mr. TUBRIDY. It reads:

"We wish to advise you that the technical agreement between La Cellophane and ourselves relative to the exchange of information on the manufacture of regenerated cellulose film has been cancelled by mutual consent. Although we believe that your technical relations with La Cellophane ceased upon the capitu-
4136 lation of France, we feel compelled to advise you of this cancellation so that no technical information will flow between La Cellophane and ourselves through your company. In other words, we are no longer entitled to receive information from them, nor are they entitled to receive information from them, nor are they entitled to receive information from us. We feel sure that you will take the necessary precautions so that no information will flow indirectly through your company."

The Government offers in evidence Exhibit 1283, dated May 2, 1941, from Mr. Armstrong, the Director of British Cellophane Limited, to duPont.

(Letter from Mr. Armstrong, British Cellophane Limited, to duPont, dated 2nd May, 1941, was received in evidence and marked "Government's Exhibit No. 1283.")

Mr. TUBRIDY. It reads:

"We have received Mr. L. A. Yerkes' letter of the 26th March, 1941, in which you advise us that the technical agreement between yourselves and La Cellophane relative to the exchange of information on the manufacture of regenerated cellulose film has been cancelled by mutual consent, and that you are no longer entitled to receive information from them, nor are they entitled to receive information from you.

"We wish to advise you that we shall interpret henceforward Clause 5 of the Agreement between you and us of the 3rd
4137 May 1935 accordingly, and that we have taken all necessary

precautions so that no information will flow indirectly through this Company."

* * * * * * *

4138 Mr. Gesell. Could I take up this section?

Mr. Tubridy. Surely.

The Court. You have covered 10 and 11?

Mr. Tubridy. Yes, sir.

Mr. Gesell. Well, as your Honor will observe, we are back in cellophane again and away from caps and bands.

4139 The Court. We have some caps and bands in here.

Mr. Gesell. A little caps and bands in here, yes.

The issue tendered is the issue tendered by paragraph 41 of the complaint, which recites that duPont conducted its business in accordance with the understandings that have been alleged in the earlier paragraphs for the division of territories, and so forth, and it says, "C. Until on or about October 17, 1940"—if your Honor will observe, that is the actual date of Exhibit 1273—"at which time duPont nominally disavowed the allocation of markets incorporated in said terms, but, in fact, duPont continued, thereafter, to operate and is now operating in conformance with the illegal division of territories. On or about March 26, 1941"—and that date seems to pick up these later cancellation documents that Mr. Tubridy just reviewed—"the defendant gave notice that, because of conditions growing out of the then current hostilities in Europe, it regarded its agreements with La Cellophane, Viscose Francais, and Kalle as terminated."

The heading—that paragraph of the complaint which is, of course, denied, and the purported negation and the purported cancellation lead me to believe that what the Government is driving at here is that this was not a bona fide cancellation of the agreements. All I could say to your Honor is that on these documents which simply show the cancellation—there are others which

4140 are coming along which I take it they intend to rely on to show that the arrangement in some way continued—you see nothing but a straightforward business approach to the cancellation of these agreements growing out of the conditions attendant on the war. When the French plants were overrun by the Germans, certainly new conditions developed and that resulted in these cancellations taking place, and letters were sent out. I think it is not disputed that they were sent out. The matter was presented to the duPont Executive Committee on the advice of its counsel, and interested officials, and acted upon. So, certainly on these documents you have direct evidence of cancellation and no evidence in this group of purported cancellation.

The COURT. Well, you say that the documents show that on and after March 26, 1941, La Cellophane, Viscose Francaise, and Kalle were out of the picture and that simply left Viscose Development Company and B. C. L.?

Mr. GESELL. That is right.

The COURT. And that at a later time they in turn dropped out?

Mr. GESELL. Yes. The only agreements that continued—the only agreements that continued here were the agreements with the British.

The COURT. Yes.

Mr. GESELL. And in the subsequent sections coming along
4141 here that the Government is offering to show that the agreements were continued, you will find a lot of evidence that the British agreements were continued. There isn't any dispute about that. But we say that the agreements with the French and with the Germans were cancelled by these letters, and that it was not a purported cancellation, but an actual cancellation.

The COURT. Was the hope of re-engaging in activities, as expressed in one of the letters, fulfilled?

Mr. GESELL. That is going to be the bone of contention between us. We say it was not. The Government will come along in these subsequent documents and seek to show that it was.

I can call your Honor's attention to one very clear fact which seems to me to go to the question of territories which is, after all, what the allegation of the complaint is concerned with. It says, "Illegal division of territories." The Government's own documents already introduced show that from this time on duPont made substantial exports into the various markets of the world which they would have been barred from selling into if the territories had been maintained, and we have already been over those documents with the Court which show substantial exports into territories which were supposed to be unavailable to us by this alleged illegal division of territories, and I think on the Government's own proof so far we have direct evidence that these
4142 cancellations were in fact implemented by conduct and that the exports were made.

The COURT. That reference you have just made, I presume, is to Government Exhibit 399?

Mr. GESELL. Yes, to export figures that we had just a moment ago, your Honor.

Mr. TUBRIDY. I would just like to say a word, your Honor.

The COURT. I have never stopped you.

Mr. GESELL. I haven't, either, but may I for a moment confer before Mr Tubridy starts?

The COURT. Yes.

Mr. GESELL. Mr. McGlothlin points out, your Honor, in discussing the British agreements I failed to make one point that I had intended to make, and that is with respect to the letters of October 17, 1940. You will see there that any territorial limitations growing out of the licensing of secret processes and inventions were eliminated, and when I say that the British agreements continued, I mean that they continued as far as the licensing of patents and secret inventions were concerned; but that after October 17, 1940, no limitations existed of a territorial nature based upon the licensing of secret processes or inventions, and to that extent the British agreements were also changed as of October 17, 1940. Of course, information had fallen into the hands of
marauding armies by this time, France having fallen in
4143 June, 1940, and it was no longer secret.

So that after these cancellations had taken place the only arrangements we had were with the British for the licensing of inventions back and forth, with no territorial limitations attaching to the licensing of secret processes and inventions either before that time licensed or licensed subsequently.

As bearing on the genuineness of the cancellation I think also I should call attention to Exhibits such as 1279 and 1280, showing the very substantial number of people in official responsibility in the company who were advised of these cancellations immediately upon their taking place—not only technical men and accounting officials, but people in the foreign relations, legal, development
department, but in actual operating end—Mr. Hatt.
4144 The COURT. Proceed, sir.

Mr. TUBRIDY. Of course, you appreciate our position, your Honor. In fact, I can use Judge Rifkind's words in his opinion in the United States vs. National Lead Company case, where he was faced with this problem——

The COURT. I have it right here.

Mr. TUBRIDY. In which he states——

The COURT. Do you have the page?

Mr. TUBRIDY. 527, your Honor. It is in the right-hand column, next to the last paragraph. He says:

"In sharp contrast with National Lead, duPont exhibited, from the very beginning of its interest in titanium, an alert consciousness of the anti-trust laws and moved cautiously and under the guidance of trained anti-trust lawyers. The question is whether it succeeded in avoiding not only the form but also the substance of transgression. I have concluded that it has not; and I arrive at that conclusion by the following analysis of the facts: * * *"

The COURT. What does he mean by that, that they went ahead violating the law because they got some misdirected advice from the lawyers?

Mr. TURRIDY. Apparently there was a very close question, sir, in that case and they held that they did violate the anti trust laws.

4145 In that connection, your Honor, I would like to point out, that it is quite true that they exported, but they exported when? When the French couldn't export to those areas that were the French before; when he B. C. L., they couldn't have bottoms, couldn't ship to Australia. Furthermore, there were some exhibits in here which indicated that Canadian Industries Limited wanted to go sell into B. C. L.'s territory in order to save B. C. L.'s customers for it after the war. So that you do have exports into these areas that they didn't export to before as a result of war conditions. We don't dispute that. But we point out that where you have a vacuum and you have collaboration before, it is not strange to find that they export into these areas that the collaborator held before and was no longer able to maintain.

The Government offers in evidence Exhibit 1285, which is a letter from Mr. Keller to Messrs. Albright, Cary, Hatt, Lee, Ridgeway and Shackelford, dated December 8, 1944.

(Letter from Mr. Keller to Messrs. Albright, Cary, Hatt, Lee, Ridgway and Shackelford dated December 8, 1944, was received in evidence and marked "Government's Exhibit No. 1285.")

Mr. TURRIDY. It reads.

"Exchange of Technical Information with Former Associates.

"It does not seem unreasonable to expect that some of our former associates from France will appear at our offices in

4146 the near future. It would be a perfectly natural thing if, in the excitement over seeing 'long-lost' friends, the conversation might turn to business matters and, therefore, to the communication of technical information.

"This is to remind you that there have been no modifications of the Government's restrictions on the exchange of technical information. Visitors from liberated countries still fall into the classification of visitors from enemy-occupied countries and they must be treated accordingly until they are fully cleared by the different Agencies in Washington.

"It is my understanding that the Foreign Relations Department and Legal Department are keeping this matter actively before them and will advise us promptly if there is any change.

"It might be well to bring this to the attention of all those who might have occasion to come in contact with visitors from liberated countries."

The Government offers in evidence Exhibit 1286, which is a letter dated February 5, 1945, from Mr. Keller to Mr. Yerkes.

(Letter from Mr. Keller to Mr. Yerkes dated February 5, 1945,

was received in evidence and marked "Government's Exhibit No. 1286.").

Mr. TURRIDY. It is entitled "French Agreements Re Viscose."

It reads:

4147 "In connection with Mr. Gillet's letter requesting information on recent cellophane machine developments in the United States and England, I have reviewed the status of our French technical agreements re vicose.

"As you know, we had three agreements:

1. Comptoir—Viscose rayon yarn and fibers—Original date December 26, 1923.

2. La Cellophane—Viscose film—Original date December 26, 1923.

3. La Societe de la Viscose Francaise—Viscose caps and bands—Original date January 1, 1930.

"The French cancelled the first two agreements, and the third by implication, with their letter of Dec. 31, 1949. We accepted cancellation with our letter of March 26, 1941 in accordance with the Executive Committee's resolution of March 19, 1941. Our cancellation specifically included caps and bands.

"The French cancellation states:

'We wish to bring to the knowledge of your company the following facts, the consequences of which are of a nature to modify, without any voluntary intention on our part, the technical agreements existing between your company and our group in the field of viscose yarns and fibres and that of transparent papers:

4148 "* * * It is only the present circumstances that oblige us to renounce to such collaboration.'

"In view of the reference in the French letter to the involuntary nature of their act of cancellation, the French may conceivably entertain the notion that the agreements were in fact not cancelled; however, there was no question about our state of mind when we confirmed the cancellation. It might be well to ascertain the French concept, and, if necessary, to restate our position.

"The three agreements called for exchange of technical information, for the granting of exclusive licenses under each other's inventions, and for the granting of sub-licenses in the respective territories, provided the other party to the agreement was advised.

"In the course of normal events, the Rayon and Caps & Bands agreements would have expired on December 31, 1950. I was not able to find a clear-cut statement in regard to the expiration date of the Cellophane agreement.

"In regard to Mr. Gillet's request for information, this could be given to him without having a technical agreement if we choose to do so.

"For the time being, Government approval is required to send technical information to France.

"If we should find it desirable to negotiate new 4149 technical agreements, we should determine:

1. The United States Government's position re international agreements.

2. The United States Government's position re exclusive licenses under such agreements.

3. Question of assignment of patents versus licenses in the field of agreement.

"The future technical agreements might conceivably cover the exchange of information and visits; and leave the matter of licenses to separate negotiation whenever a patented invention appears to be worth while.

"We probably have much to offer to the French in all sections of the viscose business and relatively little to receive in return. It might be well to determine to what extent we now have a trading position to modify the terms of the Acetate agreements.

"Restoration of French cellophane production might conceivably be advanced if we sold them some of the parts from our Buffalo machines which are now in Surplus Machinery."

The COURT. I just want to make one note. Who is "M. K."?

Mr. TUBRIDY. Manfred Keller.

Still on Exhibit 1287, to the Executive Committee from the Rayon Department. It is captioned: "Question of Resumption of Relations with our Former French Associates re Cellophane."

4150

It reads:

"I think the attached correspondence (letter from Mr. Charles Gillet dated January 30, 1945 and our proposed reply) is self-explanatory.

"Our reply has the approval of the Legal Department.

"L. A. Yerkes, General Manager."

The Government offers in evidence Exhibit 1287, a letter dated January 30, 1945, from Charles Gillet to Mr. Yerkes.

(Letter from Mr. Gillet to Mr. Yerkes dated January 30, 1945, was received in evidence and marked "Government's Exhibit No. 1287.")

Mr. TUBRIDY. It reads:

"I want to thank you very much for your letter and the good news of everybody which you gave me.

"Mr. Wardenburg will tell you that he saw everyone of us before he left France and that we were all doing our best, in spite of our difficulties, to give a little activity to our various enterprises.

"Up to now, two of our plants have been severely damaged by the Allied bombardments:

"Our plant in Valenciennes will not be able, to our best judgment, to resume any activity before end of 1945, and the plant of La Cellophane, at Mantes, has been very severely bombarded last months of May and June, and our 6 machines
4151 together with the entire spinning building have been practically destroyed.

"In view of the necessity to resume the manufacture of Cellophane as soon as possible, we have started at once the rebuilding of the spinning Department and rebuilding the destroyed machines. We hope to be able to have two of our old machines ready to work in April or May, of this year, using the various parts of the 6 machines destroyed, and we hope to have two more rebuilt between the end of the year and the Spring of next year.

"For the remaining two machines, we cannot hope to be able to rebuild them before very long and we should like before we start the rebuilding to ascertain whether something new in the way of Cellophane machines has been invented either in the U. S. A. or in England.

"We are still in the dark about our plant in Colmar; it has been the place of hard fighting for the last weeks and we are very much afraid that the plant will have been badly damaged when we can recover Colmar.

"All the other plants are in pretty good shape, damages have been rather slight, but naturally the keeping up of buildings and machinery has been very hard during those 5 last years and we will have certainly a lot of hard work in front of us to put them into very good shape again.

"For the time being we are working at a very small
4152 percentage of our total capacity, between 10 and 15% and, in a few weeks, we will be entirely short of raw materials. We are badly in need of Cellulose, but the shipping facilities are so small that we are very much afraid to have for a while to stop all our activity before we receive the necessary supplies from U. S. A. and Canada, although we have learned, during the period of occupation how to make Rayon and Cellophane with very low grade qualities of raw materials.

"We have been asked for a production of high tenacity Rayon for tires, but naturally things take a long time to get running smoothly as we need absolutely to get from the American Army the necessary raw materials for this special manufacture.

"As regards Acetate plants, they are working a little better than the Viscose plants as outside cellulose they need only French manufactured raw materials.

"As regards Nylon, we have really done our best, considering the situation in which we were, i. e.: small knowledge of technical

processes and great difficulties in the manufacture of the necessary machinery.

"One of our great satisfactions has been to be able to have a regular production and to increase it every year and having been able all the time to keep it out of attention of the Germans, and without having delivered to them one single pound of the
4153 manufactured product. It has been all employed on Hosiery, Fishing tackle, Tooth brushes, etc., etc., that is peaceful uses. We are beginning now only to have part of our production turned into War uses as yours have been all the time.

"Trusting that these few details on general lines will interest you and your colleagues, and hoping that in a near future we shall be able to discuss matters in a more interesting way,

"Believe me, dear Mr. Yerkes,

"Very sincerely yours."

The Government offers in evidence an attachment to 1287, letter from Mr. Yerkes to Mr. Gillet, dated February 12, 1945.

(Letter from Mr. Yerkes to Mr. Gillet dated February 12, 1945, was received in evidence and marked as part of "Government's Exhibit No. 1287.")

Mr. TUBRIDY. It reads:

"I was very glad indeed to get your letter of the 30th.

"I am unable to give you at this time any very detailed information as to our situation over here because of the censorship, but we have, as you may or may not know, greatly enlarged our nylon operations during the war. The industry production of viscose tire yarn has been increased from 12,000,000 or
4154 15,000,000 pounds per annum to over 250,000,000 pounds per annum, as reported in the daily press, our portion being 50,000,000 pounds. Acetate has not been increased to any material extent as the uses for acetate in strictly war purposes are very limited. Cellophane of course has gone to war in a big way and we estimate that, counting in the film for gas capes which we have been making in great quantities for the last several years, at least 25% to 30% of our entire production has been used for direct war purposes.

"The first question that you have brought up in reference to the rebuilding of your cellophane machines brings us frankly up against the future consideration of technical agreements. You will recall that our rayon, cellophane, and caps and bands technical agreements were cancelled in 1940.

"Any renewal of these * * *" then there is a line through "renewal of these" and handwritten above it is "new"—"* * * technical agreements will probably be subject to approval of the Department of Justice. All foreign agreements have been the subject of considerable discussion during the past few years, and, while

nothing is definitely settled at the moment, it is our opinion that after the war such agreements will have to have approval from Washington. It is going to take a considerable length of time before these matters are clarified."

The COURT. Is Mr. Yerkes acgirate in that contention? Does the Department of Justice give advisory opinions?

Mr. TUBRIDY. No, sir.

4155 Mr. GESELL. Perhaps, your Honor, I could say that at that time there was much discussion of possible legislation for the filing of these agreements either with the State Department or the Department of Justice. And I am sure that is what the letter has reference to. But there was no such legislation ever passed.

The COURT. I understand, sir.

Mr. TUBRIDY. Continuing:

"The sending of any technical information outside the United States at this time is still under severe restrictions and has to be approved as to each item. Specific licenses are required from the Foreign Economic Administration (which controls all exportations, including technical data) and from the United States Treasury Department (which controls transactions with nationals of certain foreign countries, including France).

"It is possible that some time during the coming year many of these restrictions as well as the restriction on travel will be lessened and perhaps you will be able to send one or two men over here. Even though we were not then prepared to enter into new agreements for the exchange of technical information, we think it could be arranged in this instance to have your men inspect our latest cellophane casting machines, subject to any licenses or approvals from our Government that might still be necessary.

4156 "I am very glad to note from the rest of your letter that most of your plants have not been damaged.

"With kindest regards."

The Government offers in evidence Exhibit 1288, which is an extract from minutes of the Executive Committee meeting No. 1882, dated February 14, 1945, E. I. duPont de Nemours & Company.

(Extract from Minutes of Executive Committee Meeting #1882, February Fourteenth, 1945, E. I. duPont de Nemours & Company, was received in evidence and marked "Government's Exhibit No. 1288.")

Mr. TUBRIDY. It reads:

"Request by La Cellophane for Technical Information:

"Letter was presented from L. A. Yerkes, General Manager, Rayon Department, dated February 12, 1945 (#2912), transmitting copy of letter, dated January 30, 1945, from Charles Gillet,

of Comptoir des Textiles Artificiels, on the above subject, as well as copy of proposed reply in form approved by our Legal Department.

"After discussion, the letter and enclosures were ordered filed, the Committee seeing no objection to the Rayon Department proceeding as suggested in its proposed reply."

The Government offers in evidence Exhibit 1289 but will not read the same, sir, because the material has been covered.

* * * * * *

4171 The COURT. Very well. Are those the documents that fall into category 10 or 11, or are those ones he has entered so far under 12?

Mr. GESELL. Under 12, sir, persistence of the understanding.

I think the best way for me to handle it would be to go through briefly each of them at a time so that we may point up what we think is their significance.

By way of preface, I think I should recall to your Honor that duPont's relations with the Comptoir group were varied and involved a number of different products. We had an acetate agreement with them, as the documents show. We had a rayon agreement with them. We had a nylon agreement with them. We had a cellophane agreement with them. We had a cellulose band agreement with them. So that there were a host of different contracts. Some of them were cancelled during the war and some were not. And I will try to point out the significance of that on some of these documents as we go through.

The first one, 1285, at page 1623, is a warning to all concerned. It does not relate specifically to cellophane, and it does not relate specifically to any product particularly. It covers the whole range of all foreigners who may be coming into Wilmington now that the war situation in Europe is reaching a stage where relations can be resumed with people in France.

4172 Now, there were many different agreements with people in France, and this is a general caution today that there are restrictions upon the disclosure of information and discussion with long lost friends, and we must remember that we have regulations to observe.

That shows, to my mind, no persistence of an agreement to divide world markets—quite the contrary. It says we shouldn't discuss with any of them at this time matters relating to technical information.

1286 is a letter in which Mr. Keller says to Mr. Yerkes, in discussing the cancellation and status of different agreements with the French, that there was no question about our state of mind when we confirmed the cancellation, making it clear that he

thought that the agreement had been cancelled and that that was his state of mind. Far from showing persistence of an agreement, that again to my mind shows an attitude of sticking by the cancellation arrangement that was made.

It is prompted by Mr. Gillet's letter which comes later at 1287, which your Honor will see at page 1627, requesting information concerning cellophane machines. You see, he says, at the beginning of 1286, "In connection with Mr. Gillet's letter requesting information on recent cellophane machine developments * * *", and that letter is the letter 1287 in which after telling what has happened abroad and in France as the result of bombard-
4173 ments and the various products, he says in the sixth paragraph on page 1627, * * *, we should like before we start the rebuilding to ascertain whether something new in the way of Cellophane machines has been invented either in the U. S. A. or in England." And it was that comment in this letter about his difficulties that prompted Mr. Keller to say, "Look here, remember, we have cancelled these arrangements," and as he says on page 1625, "If we are interested in going ahead with them, we have to take into account existing Government regulations, the attitude of the lawyers about exclusive licensees, and the attitude of the Government about international agreements and a host of other considerations." There is no indication there of a continuation or persistence of the agreements—again quite the contrary.

The reply to Mr. Gillet goes out reminding him of the cancellation of the agreements in the second paragraph—that is 1289—"You will recall that our rayon, cellophane and caps and bands technical agreements were cancelled in 1940. Any new technical agreement—" if one is to be entered into, is the implication—"will probably be subject to the approval of the Department of Justice." There is nothing there about continuation or perpetuation of the arrangements; rather a clear statement of duPont's position that the agreements were cancelled. That letter goes to the Executive Committee for action and is approved by them.

4174 Then comes a letter 1292 at page 1636 from Mr. Wardenburg. Mr. Wardenburg was connected at that time, I believe, with the London office of duPont, and he obviously had gone into France at a fairly early date to find out what the situation was. You understand that the French owed duPont, as this letter indicates, nylon royalties, duPont had arrangements with them as to acetate; payment of substantial royalties, as the early document indicated, and he called on Mr. Gillet, and he reports what Gillet told him about the destruction of cellophane machines, nothing about territories, and nothing in that letter about reopening some kind of a technical relationship.

Then comes Exhibit 1293, Mr. Hines, the Cellophane Division Manager, and he says, "Bernheim is in Wilmington," and he sends it to all his crowd, and they all initial it, and he says, "It is to be understood we are not free to give Bernheim information in regard to processes and technical developments, and it is also well to avoid too much information on potential markets and sales." Not persistence, but quite the contrary—a warning to his group that they should not discuss with Mr. Bernheim the matters which came within the prior arrangements, according to the Government's theory.

Then comes this letter 1294, concerned with nylon, which the Government offers because Mr. Bernheim says that he is very happy that "in despite of the last years' sad events
4175 and the impossibility of contact or correspondence your personal feelings for us and our group have been submitted to no change, which I am glad to say is absolutely reciprocal." Well, it is sort of a cordial ending to a letter in which he says, "I am glad we still are on a personal relationship," and I can't see why they should not be. These people have been together on Boards of Directors and connected for many years, and is there anything wrong in Mr. Bernheim's having gotten an impression when he came here that duPont was sympathetic with the problems of the French who had been overrun by the Germans and that we were still willing to talk with them? Is that a persistence of some kind of illegal arrangement? I confess I can't see it.

Now, 1295 comes along—

The COURT. There is no significance I should place on the use of the word "collaborator", is there?

Mr. GESELL. I think not. I think that is a French word for "colleague", your Honor. It was that connotation.

1295, Mr. Wardenburg writes another letter to Jenney. He says, "I secured a small amount of information," and then he reports on the status of the French, the Belgian, the Swiss, the Spanish, the German and the Italian companies, as to whether or not their operation is the result of the war. A natural thing for him to report. That doesn't show anything more than the fact
4176 that he had talked to Mr. Carnot of the Comptoir; and I am sure he talked to Mr. Carnot, as he says, on a number of occasions about a number of problems that duPont had with the Comptoir pending.

Exhibit 1297, your Honor, is the next one. I would like there to point out that Mr. Leach saw Mr. Brandenberger in Paris. We have it in evidence that Mr. Brandenberger had been over here and set up the original Du Pont Cellophane plant and at that time Mr. Leach was the foreman in the cellophane plant, and undoubtedly met and became acquainted with Mr. Brandenberger. But

he says, "We requested no figures." Does that show a persistence of arrangement? "We requested no figures." And he reports on some gossip that he has obtained abroad, and in his next letter after again seeing Mr. Brandenberger he says, "We are not yet discussing business matters with the Comptoir." Does that indicate a persistence of the arrangement? I think not. I think it indicates the opposite.

And what information does he send? He sends a leaflet that he picked up at the cellophane exhibit in Lyons, something that any man could pick up if he went in off the street and went to the exhibit. It was of interest. Why shouldn't he send it along?

Exhibit 1299 is, of course, of no materiality. It shows that Mr. Armstrong is coming over pursuant to the B. C. L. agreement to
visit the plants and get information. The agreement was
4177 still in force and effect, and of course there continued to be the technical interchange under it, and this is the document showing that he is coming over and we were going to receive him.

That is all we have on these documents—a renewing of contact with some of the people in France after France was liberated, brought about by business necessity because of existing arrangements and natural curiosity; but this is directed to a provision of the complaint which says that we continued a territorial division, and I see nothing in here about territories or a renewal of old arrangements of any kind. Most of it is gossipy letters from Europe.

Mr. TUBRIDY. The Government offer in evidence Exhibit 1304.

(The letter from C. F. Brown to J. E. Hatt, dated September 3, 1942, was received in evidence and marked "Government Exhibit No. 1304.")

Mr. TUBRIDY. This is a letter to Mr. Hatt from Mr. Brown, dated September 3, 1942, subject, "Canadian Business."

(Reading:) "C. I. L. is rationing customers on a 50% basis. As a result, some of them are trying to get film from the United States.

"We are, of course, making no effort to develop business of this type, but have handled those cases, few in number, which have come up through our domestic customers as follows:

4178 "(a) Permitting reshipment by customer—Example: General Seafood, Boston, ship to their packing plant in Halifax.

"(b) Shipping in care of our customer at port of entry, he to pick up and handle at that point. Example: Thomas Royal for their Canadian plant.

"(c) Advising C. I. L. in advance and obtaining their approval.

"Attached is report from C. I. L. covering importation of American film into Canada by quarters. You will note the large in-

grease. (McNab thinks there is some error, particularly in the 'manufactured', i. e. converted classification—even so, there is still a large increase).

"Sylvania recently obtained the business of Imperial Tobacco through Brown & Williamson. Their inquiry to us went astray.

"They followed up in three weeks. We offered either (a) or (b) handling. Sylvania got the business on basis of shipment through an expert agent direct to Imperial and billing to B. & W.

"Questions:

"1. Could we handle direct shipments into Canada if C. I. L.'s permission were obtained.

"2. Shall we make any effort to obtain Canadian business
4179 (particularly B. & W.) under present oversold condition? (seems to me it would not be fair to established domestic trade)."

The Government offers in evidence Exhibit 1306, a letter from Mr. Brown to Mr. Pfeltz, dated June 9, 1942.

(The letter from Mr. Brown to Mr. Pfeltz, dated June 9, 1942, was received in evidence and marked "Government Exhibit No. 1306.")

Mr. TUBRIDY. (Reading.) "Referring to your letter of June 8th, we are glad to include on the agreement rider American Can Southern, New Orleans and Houston, Texas.

"As far as Canada is concerned, we are not in a position to service customers in that territory and suggest that you take up this matter with Canadian Industries, Ltd., Montreal, who manufacture cellophane for distribution throughout the Dominion.

"With best regard."

The Government offers in evidence Exhibit 1307, from Mr. Ichla to Oswego Falls Corporation, dated October 13, 1942.

(The letter from Mr. Ichla to Oswego Falls Corporation, dated October 13, 1942, was received in evidence and marked "Government Exhibit No. 1307.")

Mr. TUBRIDY. This letter reads:

"GENTLEMEN: Mr. B. Y. Bandy of our New York office has forwarded us your letter of September 29th, with which you
4180 sent us two copies of the Converter Agreement properly signed. As soon as they have been executed at this end one copy will be returned to you for your records.

"The purpose of this letter, however, is to call your attention to the fact that on the subsidiary rider of the agreement you have included Canadian Sealright Company Limited, Peterboro, Ontario, Canada. We are obliged to cross this off inasmuch as we handle no Canadian business. All Canadian business on cellophane is handled by Canadian Industries Limited."

4181 The Government offers in evidence Exhibit 1309, letter from E. G. Lake to Mr. Massey, of Smith Paper Company, dated December 20, 1943.

(Letter from Mr. Lake to Mr. Massey, Smith Paper Co., dated December 20, 1943, was received in evidence and marked "Government's Exhibit No. 1309.")

Mr. TURRIDY. It reads:

"Mr. T. K. Woods has sent me your letter addressed to him dated December 7th with the request that we take action upon it.

"Our Canadian associates, namely, Canadian Industries Limited, are manufacturers of Cellophane in Canada. Since they are the ones for Appleford to look to for source of supply on Cellophane, I am taking the privilege of acquainting our Canadian associates with their interest in the matter, as I am sure they will extend every courtesy to Mr. Powell in his converting operations.

"Mr. Lewis G. McNab is Sales Manager of the Cellophane Division of C. I. L. and I know he will deem it a pleasure to discuss this matter fully with Mr. Powell very soon.

"Trusting the foregoing answers your letter satisfactorily and that our procedure in handling the matter meets with your acceptance, I am, with the best of Season's Greetings,

"Cordially yours."

4182 That is in connection with Canadian business, and Mr. Gesell would like to comment now in connection with that.

Mr. GESELL. It will be very brief, your Honor. I simply want to point out that these relate to C. I. L. and that duPont continued after the war as before the war to conduct its business with C. I. L. in the same manner as it had before. They were the Canadian subsidiary to manufacture in Canada. I want to emphasize that these demands for Canadian business of DuPont arose during the oversold condition you will see noted on that first exhibit that was discussed, Exhibit 1304, at the bottom of the page. And during this post-war period and war period that we are talking about there was a very substantial oversold period and shortage situation created by allocation and war demands as we will see from other documents. And we said it would not be fair to our other customers for us to try to go into Canada and supply new customers when we haven't got enough to supply our existing trade.

4194 The Government offers in evidence Exhibit 1329, dated April 6, 1943. It is addressed to Mr. Yerkes and has the name Keller on the bottom at the right.

Government's Exhibit 1329

(The letter from Mr. Keller to Mr. Yerkes, dated April 6, 1944, was received in evidence and marked "Government Exhibit 1329.")

Mr. TUBRIDY. It reads:

"According to the attached letter, the Legal Department holds that we are free to transmit to and use in China any information which we possess in regard to viscose rayon and cellophane.

"I take from conversation that the question of authenticity of Mr. Gillet' signature and his authority is of no material consequence. Disclosure of information to the Germans and others constitutes cause for cancellation of the agreements, regardless of how we happen to know about it."

The Government offers in evidence as part of Exhibit
4195 1329 the attached letter from Mr. Daley to Mr. Keller dated April 6, 1944.

(The letter from Mr. Daley to Mr. Keller, dated April 6, 1944, was received in evidence as part of Government Exhibit No. 1329.)

Mr. TUBRIDY. It reads: "Re: Manufacture of Viscose Rayon and Cellophane in China.

"At your request, a study has been made of the Comptoir and La Cellopliane situations in order to determine whether any legal restriction exists as a result of our relations with the French which would prevent our use of information now possessed by duPont in the production of rayon and cellophane from viscose, in China. It is contemplated that the information may be used by duPont either on its own behalf for the erection of plants in China, or may be transmitted to others for the erection of such plants.

"Both the Comptoir and La Cellophane agreements, as written, contain provisions with respect to maintaining information confidential or secret.

"Thus, referring to the Comptoir situation, the agreement of Jan. 22, 1920 (Articles 3 and 7) and the agreement of Dec. 26, 1923 (Article 7) provide for maintaining technical information passing between the parties as secret and confidential and the agreement of Mar. 18, 1929 recognizes the continuance of cer-
4196 tain articles of the original agreement of Jan. 22, 1920 including the technical interchange and secrecy provisions.

"With reference to the La Cellophane situation, the Jan. 6, 1923 agreement (Article 3) and the agreement of June 9, 1923 (Article 12) provide for secrecy; the Dec. 26, 1923 agreement does not expressly provide for secrecy, but in Article 7 states that the obligations of Arena and duPont intended for the benefit of the Du Pont Cellophane Co., Inc. are assumed by them directly with Du Pont Cellophane Co., Inc., and the Mar. 18, 1929 agree-

ment canceling the June 9, 1923 agreement provides for the assumption by the new Du Pont Cellophane Co., Inc. of obligations including that pertaining to secrecy.

"Notwithstanding the apparent commitments as to secrecy under the contracts, it is the opinion of the Legal Department that E. I. duPont de Nemours & Co. is not bound to maintain as secret and confidential any information which it now possesses with respect to rayon and cellophane made from viscose for the following reasons:

"(1) Any obligation as to secrecy or confidence which may in the past have been imposed upon duPont by virtue of the agreements referred to has been terminated as the result of a letter dated Dec. 31, 1940 from Charles Gillet, in which letter Gillet, acting for the Comptoir, stated that he was bringing to duPont's attention facts modifying the technical agreements in the
4197 fields of viscose yarn and fibers, and transparent papers, to-wit; the occupation or control of certain plants by the German Armies and the conclusion, by pressure of the French Government and the occupying authorities, of technical agreements with a German group, as to viscose yarns and fibers. The letter stated that it was not possible for the Comptoir, as to viscose, to conform to the provisions of the technical agreements. By a letter dated Mar. 26, 1941 from duPont to the Comptoir, duPont stated that it considered its technical agreements with the Comptoir, La Cellophane and Societe de la Viscose Francaise to be terminated. The termination of the agreements in question not only brought to an end technical interchange, but also nullified any injunction of confidence since the two commitments seem inseparable.

"(2) Additionally, the said letter of December 31, 1940 from the French clearly shows that the information contemplated by and exchange pursuant to the technical agreements can no longer be considered secret since it has passed beyond the control of the French.

"(3) The bulk of information comprehended by the technical agreements must, over the course of the twenty years or more which have passed since the signing of the first agreements, have passed beyond the bounds of secrecy. The original information received from the French has been disseminated among many associates as well as competitive companies and has appeared
4198 in countless patents and literature articles. It is furthermore believed reasonable to state that the greater part of the information which duPont now possesses originated with duPont and this information also, with the passage of years and in view, among other things, of duPont's liberal patent policy, has passed into the domain of public information.

"(4) It is not entirely clear from the agreements whether the injunction of secrecy was intended to be imposed upon either party as to information originating with such party. In this connection, duPont has felt free to give to others information with respect to high tenacity rayon for the furtherance of the war effort.

"Even if in future litigation duPont should be considered as having breached a contract of secrecy as to viscose rayon and cellophane, it is believed that the liability in the event of an adverse decision would not be large since the major part of the information discussed herein must already have become available to the public and since rayon and cellophane can undoubtedly be produced on the basis of information which is available to the public.

"A brief mention may be made of Kalle's position in the cellophane field. It is understood that La Cellophane licensed Kalle to use its processes in China. The Kalle situation should, however, be considered as part of the La Cellophane situation
4199 and should be decided the same way, particularly in view of the fact that we consider our Kalle agreement terminated as stated in our letter to Kalle of Mar. 16, 1944.

"In summation, as far as the French agreements and relations are concerned, this company is free to transmit or use anywhere any information which it possesses with respect to rayon or cellophane made from viscose. Local patent situations, of course, may interfere with such free use, but it is believed unlikely that there is any patent obstacle in China."

This is just a comment in connection with this, sir: If they are basing these licensing agreements and division of territories on patents and licensing in countries where they are registered, how do they include China?

The COURT. I suppose that is a rhetorical question?

Mr. TUBRIDY. Yes, sir.

The COURT. You don't want me to answer it?

Mr. TUBRIDY. No, sir.

The COURT. Because I don't know the answer.

Mr. GESELL. Aren't you going to read 1330?

Mr. TUBRIDY. I am omitting it.

(Discussion off the record.)

* * * * *

4202 As to the China situation, beginning at 1328 there appears clearly to have been a concern on the part of Mr. Abrams and others in 1944 that the letter from the French might not have been signed by Gillet. There is no evidence that they French ever said it was not signed by Gillet, no evidence that they ever said that the cancellation which we made in reply to the let-

ter was not genuine; and for Mr. Tubridy to come here and say that this shows a revival of the agreement, I think is a clear
4203 distortion of this document, because he has no evidence anywhere in his case that the French ever asserted that Gillet did not sign that letter; and if there is any question as to our intentions, and that is the issue here, I ask your Honor to note what we did. We said whether or not who signed the letter made no difference, the cancellation stands; we are going to go forward; the information is no longer secret; the Germans have come into the plan; we are going to go ahead and not recognize any territories as to China. Is that a persistence of the arrangement or is it the contrary? To me it seems to be the contrary.

4204 I ask your Honor at page 1686 and 87 to ignore the underlinings on the document which were placed by someone in the Government, not ourselves. They are not on the document as taken from our files, and these question marks and underlinings don't represent the document which was taken from the file. They are of no particular consequence, except they are not on it.

We point out clearly that this arrangement was terminated by us in good faith, and the advice of the lawyers is to treat it as such, both as to Germany and as to the French. So I see no persistence of arrangements of any kind in the Chinese situation. Our solicitude in talking to the Government about it before we went ahead was obvious because we were dealing with the Chinese Mission in the middle of the war and we wanted the Government to be informed.

So again I say, on these documents there is no indication of persistence of arrangements.

* * * * *

4217 The Government offers in evidence Exhibit 1354, cablegram dated July 17, 1946, from A. Kunsman-Cellophane-duPont to Mr. Armstrong, British Cellophane, Limited.

(Cablegram from A. Künsman-Cellophane-duPont to
4218 L. R. Armstrong, British Cellophane, Ltd., dated July 17, 1946, was received in evidence and marked "Government's Exhibit No. 1354.")

Mr. TUBRIDY: It reads:

"Dobeckmun has informed us that it wishes to buy plain, transparent viscose film from you and has stated that you wish us to consider this matter and advise you. We do not understand why this matter need be considered by us. Plain, transparent viscose film is unpatented in the United States and you are free to export such film to anyone in this country as was pointed out in our letter to you of October 17, 1940."

4219 Government Exhibit No. 1355 is offered in evidence. It is a memorandum signed by Mr. Lake, entitled "The Dobeckmun Company, British Cellophane Limited."

(The memorandum signed by Mr. Lake, entitled "The Dobeckmun Company, British Cellophane Limited," was received in evidence and marked "Government's Exhibit No. 1355.")

Mr. TUBRIDY. It reads:

"Mr. T. F. Dolan of Dobeckmun telephoned E. C. Lake on Monday, July 15, 1946, stating they wished to purchase No. 400 PT Cellophane from British Cellophane Limited because of the short supply of PT in this country.

"Mr. Dolan indicated that Dobeckmun was anxious to get about 1,000 pounds immediately to try out on their machines and, if satisfactory, would want to import about 40,000 pounds monthly—starting September. (It is thought this film will be used mostly for gravure printed hosiery envelopes.)

"Mr. Dolan requested we send a cablegram to British Cellophane Limited approving their exportation of film as above mentioned.

"After due consideration by the Cellophane Division Management, the attached cablegram was dispatched on July 17, 1946."

Mr. TUBRIDY. The Government offers in evidence Exhibit 1356, dated December 23, 1941, to Mr. Touchton from Mr. Andrews.

4233 (Memorandum from Mr. Hyden to Dr. J. A. Mitchell and Dr. W. F. Underwood dated April 9, 1946, was received in evidence marked "Government Exhibit No. 1372.")

Mr. TUBRIDY. It reads:

"In Buffalo last week I was told that copies of all reports were made for C. I. L., B. C. L., I. C. I. and V. D. L. regardless of the routing given by the author or supervisor.

"This practice should be discontinued and copies for the Associates should be made on the following basis:

"1. C. I. L. receives information concerning regenerated cellulose films—plain and coated.

4234 "2. B. C. L. is entitled to the same type of information.

"3. V. D. L. receives reports concerning cellulose tubing.

"4. I. C. I. gets information on non-viscose films and our polymer work excepting cellulose acetate.

"5. Special work on testing and analytical procedures may apply to the business of more than one of the Associates and in that event decision will have to be reached by the supervisor or manager in charge of the work."

The Government does not intend to read the rest of that exhibit.

The COURT. That was the end——

Mr. TURNEY. Of Exhibit 372. The last paragraph has not been read.

The COURT. All right, I think we will adjourn court until tomorrow morning at 10:30.

(Thereupon, court was adjourned until Friday, February 2, 1951, at 10:30 o'clock a. m.)

* * * * * *

4241 FRIDAY, FEBRUARY 2, 1951, 10:30 O'CLOCK A. M.

Present: As before noted.

Mr. MINICUS. Your Honor, I ask the Court's indulgence for just a brief moment for the purpose of a request. Yesterday afternoon the transcript shows at page 1046 that the plaintiff entered an objection to certain interpretive remarks that were going into the record with regard to the definition of the scope of the market involved in this case. The Government objected to this on the same grounds we have objected previously; in other words, that the subject matter of the interpretive statements was beyond the scope of the issues of this case. Unfortunately we did not make our position absolutely clear.

The COURT. Let me look at the record.

Mr. MINICUS. I have an excerpt from it, your Honor.

The COURT. May I say that after reading this colloquy which occurred I understood that it was the old evidence question we were going to argue; namely, the matters contained in your memorandum and the matters contained in Mr. Gesell's trial memorandum No. 1. Now, that is not the question at all. It is a question of whether or not the other items which perform the same function as cellophane are to be brought into this case. You stated

4243 your position earlier in the case, that if such matter is to be brought into the case you think it is an affirmative defense which can only be brought forward for the first time by the defendant when it presents its case. Therefore you say the Government's case should not be cluttered up with that issue at this time.

Mr. MINICUS. Over and above that, your Honor, we are contending at this time that as a matter of law these issues are entirely immaterial to the issues of our case and that any evidence on them should not be permitted into the record.

The COURT. All right. In order to clarify our program, the evidence matter which has been briefed, I am content with the arguments contained in the briefs of both parties, and if counsel are willing, I am going to decide that matter over the weekend and attempt to write a short memorandum disposing of the evidence question.

Mr. GESELL. We have no desire to argue it and will submit it on briefs.

Mr. MINICUS. Nor has the Government, your Honor.

The COURT. That is out of the way.

How are we going to attack the second problem?

Mr. MINICUS. That is what I would like to discuss for just a moment this morning, sir. Mr. Tubridy is just about drawing to a conclusion that section of the case addressed to the acquisition of the plaintiff's position in the industry and the foreign relations that were a concomitant of it. We expect
4243 that this presentation may end today or early in the next session of the trial. If I may paraphrase Judge Knox's recent remark, for which we might all join in the doxology—I mean for the passage of the subject matter, not Mr. Tubridy.

That leaves the plaintiff with the necessity of completing its preparation for the monopoly section of the case, which is the next to follow. Now, we are faced with a considerable dilemma in completing this preparation, and we presume that we will get started on that phase of the case next week when we have been able to formulate a definite conception of the peripheral scope of our market, and we can't complete this preparation until we are able to do that. For that reason I am respectfully requesting consideration of the possibility of hearing the matter this morning. I have discussed——

The COURT. May I ask you this? I have two briefs to read over the weekend and I will have to write an opinion over the weekend on the evidence question. Now you want to argue this second question today and have me consider it and decide it by next Wednesday; is that correct?

Mr. MINICUS. Not necessarily. In the first place, as far as the Government is concerned—I have not consulted the defendant on this—we think the importance of this point takes priority over the other point, and we certainly would be willing to waive any priority on the decision that the matter of the briefs
4244 had. In the second place, I don't think a decision will be absolutely necessary by Wednesday, but at least if we have this argument we will have it out of the way and we will be closer to a decision, and perhaps by Friday of next week when this thing opens up we will have some idea how to proceed.

The COURT. And so you will be prepared when you come back again also?

Mr. MINICUS. Yes, sir.

The COURT. Mr. Minicus, I think you write a wonderful prose, and that is why I would like to see a written brief or memorandum on this second question.

Mr. MINICUS. In addition to oral argument, your Honor?

The COURT. Yes. If I hear oral argument now, can you support it not with a magnum opus but with a six, seven, or eight-page brief?

Mr. MINICUS. Certainly, your Honor.

The COURT. How about you, Mr. Gesell? Could I have that by next Wednesday?

Mr. GESELL. Yes, your Honor.

The COURT. I don't want any voluminous brief, but it helps me very much when I come to consider the matter if I can refer to and get in crystallized form the contentions of the parties.

Mr. GESELL. I would like in this connection to
4245 raise one other consideration. We can argue it today if your Honor chooses, or any other day.

The COURT. I submit myself to counsel's request. What do you want?

Mr. GESELL. I have no preference, except I want to raise this point that we are just concluding the foreign relations phase of the case and we have not yet argued any of the law relating to the foreign relations phase of the case. I think as far as we have gone is Mr. Tubridy's frequent references to the National Lead case, but we have no discussion of the law as to licensing of inventions and secret processes, the legality of the basic agreements, and I was not sure as to what your Honor's pleasure was as to when these issues should be argued.

The COURT. Well, I would prefer not to have a series of truncated arguments. The impact of your advocacy is going to be more impressive to me if we have one argument whereby you go through your whole case, each side, whether it takes an hour or a day or two or three days.

Mr. GESELL. On the law aspect?

The COURT. On the law aspect.

But this matter is a matter that deals more with a procedural approach, if I get the point, as to what the Government does or does not put in.

Mr. GESELL. Whether these issues are relevant on
4246 the plaintiff's case.

The COURT. That is right.

Mr. GESELL. We can argue it this morning, your Honor, as far as we are concerned. We are quite prepared to go forward.

The COURT. If you can argue it this morning you can get some of your staff to work on the weekend, too, and let me have the memorandum the first of the week, and then maybe I will be in a position when we commence on next Wednesday to have some sort of announcement as to my rulings.

Mr. MINICUS. Very good, your Honor.

The Court. Because, as I see it, the way this case is going I can't indulge in the luxury of opinions and sitting down and writing them at length. I have to call these things right off from the bench. I think that is the procedure I will be required to follow.

Mr. Gesell. I would be quite prepared to join with Mr. Minicus in deferring the decision on the matter that has been submitted on the briefs in order to lighten your Honor's burden this weekend.

The Court. Yes, I will take that up next weekend.

Do you want to argue the matter now?

Mr. Minicus. May Mr. Renninger proceed with the argument?

The Court. Yes.

4247 Mr. Renninger. If your Honor please, in all probability the defendant's argument will be quite more extensive than mine. I would like to request permission for a few minutes at the end for a rebuttal argument to Mr. Gesell's remarks, if that is permitted.

If your Honor please, it is the Government's contention that any reference to substitute materials, substitute products, whether in the plaintiff's documents or not, is wholly irrelevant and immaterial, as they do not relate to any matter at issue in the case, and we hereby move that all references to substitute materials be stricken from the record.

Apparently, it is the defendant's contention that cellophane is in competition with a great mass of packaging materials which it has loosely designated as flexible packaging materials.

The Court. May I interrupt there to make an observation? You see how closely this is allied to the other matter, because the only reference that can be had to secondary materials falls within the ruling I have to make on the evidence matter, because any reference that has been made to other commodities has been made by Mr. Gesell as a result of reading from your records and your evidence. So the two questions are closely allied.

Mr. Renninger. In addition, your Honor, I would also like to point out that it is our contention that even if they are in the
4248 record it is our contention that these references are entirely irrelevant and immaterial and should not be considered by the Court.

The Court. Aside from the evidence question that is before me?

Mr. Renninger. Yes, sir.

The Court. I have your point very clearly.

4249 Mr. Renninger. First, your Honor, I would like to make the Government's position clear. The problem posed by this motion is that cellophane is not in competition with these packaging materials within the meaning of Section 2 of the Sher-

man Act as a matter of law. No purpose can be served by allowing into evidence a great mass of material relating to other certain products, whether certain products are or are not flexible packaging materials, and, if so, whether or not they can be considered as substitutes for cellophane.

I would like to point out, your Honor, that on a factual basis the plaintiff feels that it can definitely rebut any evidence that the defendant might attempt to produce, but any evidence of this kind would only place an undue burden on the Court and greatly prolong an already lengthy trial to indeterminable lengths.

With such an indefinite term as flexible packaging materials, it is hard to realize to what great lengths the defendant might attempt to go under such a designation.

What are the limits to this broad general term? Mr. Gesell talks about the plaintiff's attempts to set up a tailor-made definition of the market. It appears that the defendant is attempting to make its own tailor-made definition while the plaintiff is only interested with the legal definition as expressed by Congress and in the many cases interpreting the congressional mandate.

4250 Cellophane is unique in its characteristics and by that the Government has meant and means that it is a distinct product or commodity.

The COURT. Excuse the interruption, Mr. Renninger, but could someone direct me to the issue as drawn by the pleadings because that——

Mr. RENNINGER. I intend to go into that.

The COURT. Fine.

Mr. RENNINGER. As I say, cellophane is a distinct product or commodity, and I am sure that a consumer wishing to buy cellophane would look to duPont and Sylvania and not to the manufacturers of all these other various packaging materials.

I might also add parenthetically that the field of uses for cellophane is not coextensive with the flexible packaging industry.

The Government, your Honor, in paragraph 21 of the complaint, that is the charging paragraph, charges that "The defendant has monopolized, has attempted to monopolize, and has combined and conspired to monopolize trade and commerce among the several states of the United States in cellophane and in caps and bands all in violation of Section 2."

The COURT. That is paragraph what?

Mr. RENNINGER. 21, sir, the charging paragraph in the complaint.

4251 The offense charged is that the defendant has monopolized the market for cellophane and caps and bands and not that it has monopolized all markets in the packaging industry.

Let us look to Section 2 of the Sherman Act, the section that we allege the defendant has violated. Section 2 of the Sherman Act reads as follows, and I quote:

"Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year or by both said punishments in the discretion of the court."

The important phrase to be considered in the discussion of the problem under review is the words "any part of the trade or commerce among the several states or with foreign nations." The Congressional framers of the Sherman Act must have had in mind a situation such as is before us today when they phrased the Act in this manner. Any other view, your Honor, would make a monopolist defendant immune under the Sherman Anti-Trust Act.

It has been repeatedly held that any part of the trade or commerce, as used in this section, means any one of a class of
4252 things, and that monopolization of the domestic supply of a commodity without control over all classes of the product or of products having similar uses violates the Act.

In the Standard Oil case, 221 U. S. 1, 1911, Chief Justice White, after a consideration of Section 2 of the Sherman Act, stated at page 61, and I quote:

"The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and distributive significance, that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

And again in United States vs. Keystone Watch Case Company, 218 Fed. 502, the District Court for the Eastern District of Pennsylvania, 1915, the Court said, page 516:

"If the usual meaning of the word, monopoly may be said to be the acquisition of something for one-self and perhaps it would be applied most appropriately when the whole of a given trade is acquired. Practically, however, we need not contemplate so extreme a case of control or acquisition and indeed the Act itself is not primarily concerned with an offense so rare. The second section deals with a monopolization or the attempts to monopolize any part of the trade or commerce referred to, and it is clear enough therefore that Congress had chiefly in mind not so much
the monopoly of a whole, although the language might
4253 properly be construed to cover that also, as a much more likely case of the monopoly of a part smaller than the whole."

It would appear that the defendant is attempting to say that cellophane is in competition with a group of varied substitute materials, loosely designated as flexible packaging materials.

The COURT. Right at that point where do they say that?

Mr. RENNINGER. Your Honor please, in the opening statement——

The COURT. I meant in the pleadings.

Mr. RENNINGER. No, sir.

The COURT. What is this affirmative defense we have been talking about? It is not even alleged as far as I can find.

Mr. GESELL. If I may interpose, we specifically pled it in answer to paragraph 11 of the complaint.

The COURT. I thought we were dealing with paragraph 21.

Mr. GESELL. I don't think we are, your Honor.

The COURT. Just a minute, so I can follow your argument. Let me read the defendant's paragraph 11, which is in answer to the Government's paragraph.

Mr. GESELL. It starts at the top of page 17 of the printed comparison, your Honor, the portion to which I referred.

4254 The COURT. Do you mind if I interrupt for a moment?

Mr. RENNINGER. No, sir.

The COURT. I would like to ask Mr. Gesell a question.

Mr. Gesell, why wouldn't the material alleged by you in paragraph 11 of your answer—and this is not by way of criticism; it is by way of inquiry on my part—why would not that have appeared in the answer to the charging portion of the complaint if the matters contained in your paragraph 11 of your answer were to be relied on as an affirmative defense? In other words, when I read paragraph 11 I don't know whether it is exposition or whether it falls within the category of legal affirmative defense. So that for my purposes, and for clarification, could you state your position so that I can know what you are directing your argument to?

Mr. GESELL. In the first place, your Honor, I don't think any affirmative defense is required to pose this issue.

The COURT. Well, I thought you always had pleaded affirmative defenses.

Mr. GESELL. I would think this was not in the nature of an affirmative defense, such as is set up under the Rules.

The COURT. That is what I understood.

Mr. GESELL. Such as accord and satisfaction, or statute of limitations. This is a fact issue essentially, and in the denial of the monopoly charge, we pose this issue by our flat denial.

4255 In further answer to your Honor, to make it clear that this is not just exposition, you will note that the charging paragraph 22 charges that the defendant has virtual absolute con-

trol of the markets in the United States for cellophane. And those markets are described in paragraph 11. And having responded as to the nature of the markets in paragraph 11, and then denied 22, it seems to me as a matter of pleading the issue is squarely before the Government.

The COURT. Well then, how would you describe the nature of this particular facet of your defense if it is not an affirmative defense?

Mr. GESELL. Your Honor requires me really to state my whole argument with respect to it, and perhaps I had better wait.

The COURT. You are right. Be seated. I am sorry.

Mr. RENNINGER. Under such a broad designation as packaging materials, which we say is tailor-made by the defendant, one might say that cellophane is in competition with tin foil, parchment paper, kraft paper, brown wrapping paper, or rubber or leather—in fact, anything that might be used as a wrapping material. However, we deny that cellophane is in competition with these packaging materials within the meaning of Section 2 of the Sherman Act as a matter of law.

The COURT. Well, how about as a matter of fact, because
4256 I am always interested in facts. Is it a fact that they are in competition in the wrapping industry?

Mr. RENNINGER. In certain respects that they might be used as substitute materials. We do not deny that, your Honor.

The COURT. Well, substitute materials—I mean they are either in competition factually—either I buy a candy bar wrapped in wax paper or I buy it wrapped in cellophane. It seems to me those two products are in competition in so far as the wrapping is concerned. Now, whether they are in law, that is another question. My inquiry was, Are they in fact?

Mr. RENNINGER. In the sense, your Honor, that they are used as substitutes in certain instances because of consumer preferences, because of shortages—

The COURT. Why do you emphasize substitutes? I am asking the simple question, Is it a fact that they are in competition in the market place for wrapping materials?

Mr. RENNINGER. Not within the meaning of Section 2 of the Sherman Act.

The COURT. I am asking you not within the meaning because that is a legal conclusion that you have drawn and are attempting to get me to accept.

Mr. RENNINGER. No, your Honor. As I stated in the beginning, if it was ever necessary, which we do not deny that it is, I think we can definitely prove that as a matter of fact also they are not in competition with cellophane.

4257 The COURT. So that your answer to my query is that in fact these other materials are not in competition as a packaging wrapping material?

Mr. RENNINGER. Yes, sir.

It is the plaintiff's contention that such a conception as evidently espoused by the defendant makes an absurdity of the defendant's position. As I stated previously, any other view would make a monopolist defendant immune under Section 2.

By carrying such an analogy to its logical conclusion, one could just as easily say that in charging a monopolization of coal one would also have to take in consideration all other heating materials, such as gas and oil, or wool or cloth fibers, corn with all other grains, railroad transportation with buses or trucks, even electric light with the candle, or paper cartons with glass containers. And I might say here that in the Hartford Empire case the Court commented adversely to such a concept.

The COURT. By saying what?

Mr. RENNINGER. The question arose as to the relevancy of certain documents relating to paper cartons and the Court said he could not see where such evidence had any bearing on the case. And that one would have to control all related fields in an industry to have a monopoly coming within the purview of the Sher-
4258 man Act. Such a proposition does not survive its statement. Let us take brick and stone as an example. Both are building materials. Both can be used interchangeably. A house can be built of brick or it can be built of stone, and the same could be said of a chimney or a bridge or many other items. In the sense that one is a substitute material for the other it can be said that they are in the same field of commerce. But it is absurd to say that to prove a monopoly in the manufacture of brick one would also have to show that the manufacturer or manufacturers of brick also controlled the stone industry.

Let us carry the analogy a little further. Glass brick is becoming an important item in the building industry today and it is often used interchangeably with brick. It would be absurd to say that to prove a monopoly of the manufacture of glass brick that one would also have to show that the manufacturer or manufacturers of glass brick also controlled the clay firebrick industry. The customer desires to purchase brick because of certain inherent qualities in brick or because of personal preference, because of shortages or for other reasons, and is for that reason
4259 not interested in stone. The purpose of the Sherman Act is to insure that (1) a purchasing public has the unrestricted right to buy that brick from a group of various independent manufacturers of brick who are in free and open competition with the other, and (2) that anyone desirous of entering upon

the manufacture and sale of brick shall have the unrestricted privilege of doing so.

The issue in this case is therefore whether the defendant had the monopoly of the manufacture and sale of cellophane.

As I stated previously, it is not the Government's contention that for certain fringe instances and under certain conditions various other wrapping materials may not almost equally satisfy the consumer's desire for cellophane in the sense that they may be used as substitute materials. The Government, however, has not charged any monopolization of the packaging industry, or the "flexible packaging" industry, and it submits that any evidence relating to this line of commerce is irrelevant and immaterial.

Let us assume for the sake of argument that aluminum can be supplanted by nickel, lead, or zinc which can be considered as substitute materials, depending upon consumer preference, although to the naked eye they may present a similar appearance. Nevertheless, we are not concerned with whether the company manufacturing aluminum has a monopoly of the market for
4260 all products such as nickel, lead, or zinc, but only whether the company manufacturing aluminum has a monopoly of aluminum alone.

In a monopoly case we are concerned with the question whether the company manufacturing aluminum has achieved such a position in the manufacture and sale of aluminum alone as unreasonably to deter others from entering upon the manufacture and sale of aluminum, and to stifle what little competition there might be in that industry.

The COURT. Could there be a monopoly of strawberry ice cream under your theory?

Mr. RENNINGER. I think perhaps, your Honor, under some of the cases that I will cite a little later it would almost appear that that might be the case.

Assuming again that aluminum at times be substituted for a group of substitute materials such as nickel, lead or zinc, which might place a maximum price which the company manufacturing aluminum can obtain from aluminum, the purpose of the Sherman Act contemplates that a consumer shall not be reduced to a choice between aluminum and some other material, but shall have an opportunity to purchase aluminum itself from not only one company manufacturing aluminum, but from other free and independent sources, and by invoking competition in the industry, to force down the price of aluminum below the highest price he can afford to pay before turning to some other product.

4261 As an example, your Honor, in United States v. Associated Press, 52 Federal Supplement 362 (Southern District

of New York, 1943) in that case the complaint alleged that certain provisions of the Associated Press by-laws had the effect and purpose of excluding competitors of its members from membership in the Associated Press and from its "News Service", and that this agreement among the members, and their agreement to furnish their local news exclusively to Associated Press, are in illegal restraint of interstate commerce under Sections 1 and 2 of the Sherman Act, and Section 7 of the Clayton Act.

The Court in disposing of the defense that those who were excluded from membership in the Associated Press might have access to the United Press said at pages 371 and 372, and I quote: "No decision of ours as to the relative merits of the two would convince those who may chance to prefer it"—that is the Associated Press—"the grievance of being unable to choose his own tools is not assuaged when a court finds that the user does not understand his interests."

The general situation was thus described at page 371 of that case as follows:

"Most monopolies, like most patents, give control over only some means of production for which there is a substitute: the possessor enjoys an advantage over his competitors, but he can seldom
4262 shut them out altogether; his monopoly is measured by the handicap he can impose."

And the court there cited Fashion Originators' Guild v. Federal Trade Commission, which I will discuss later.

The Court concluded in that case, your Honor, that "it is impossible to treat two news services as interchangeable."

The case was affirmed at 326 U. S. 1, rehearing denied at 326 U. S. 802.

As stated previously, Congress in the drafting of the Sherman Act envisaged that one could monopolize "a part" of the trade or commerce, and so stated in Section 2 of that Act.

Let us look briefly at a few of the numerous court decisions on what Chief Justice White called the geographical significance of the words "any part".

Addyston Pipe & Steel Company v. United States, 175 U. S. 211, was an action brought to restrain six corporations located west of Pennsylvania and Virginia from continuing a combination in restraint of trade in the iron pipe business.

United States v. King, 250 U. S. 908, the District Court of Massachusetts, 1916, a demurrer to an indictment for combining and conspiring to restrain trade in potatoes from Aroostook County, Maine, only was overruled.

In Louisiana Farmers Protective Union v. The Great Atlantic & Pacific Tea Company, 131 Federal 2d 419, Circuit Court of

Appeals 8, 1942, there there was an alleged price-fixing agreement involving Louisiana strawberries to drive out
4263 competitors in the retail market.

There are many other cases illustrative of the geographical significance of the words "any part", some of which I will discuss later in connection with the second of Chief Justice White's interpretations.

The COURT. What pertinency does that have to the case at bar?

Mr. RENNINGER. Your Honor, I was just trying to tie in the two sections of Chief Justice White's definition of the words "any part" that was a geographical significance, and the second part is a distributive significance of the words "any part".

By a review of the cases under "distributive significance" it is clear that as a matter of law cellophane is not in competition with other flexible packaging materials within the meaning of Section 2 of the Sherman Act.

In the Standard Oil case cited there was a bill in equity brought under Sections 1 and 2 of the Sherman Act by the United States to restrain Standard Oil Company and others from engaging in a conspiracy to restrain trade and commerce in petroleum and from monopolizing said commerce. It was alleged that the Standard Oil Company had monopolized and restrained commerce in the oil refining business. The defendants contended that there was no showing by the Government that Standard Oil had con-
4261 trolled the oil business as a whole. It was shown that the defendant had 75% of the oil refining business but only 30% of all crude oil produced. As quoted previously, Chief Justice White stated that it was not necessary to prove that Standard Oil Company had monopolized the oil business as a whole and that a showing of monopolizing the oil refining business was sufficient.

Another case dealing with the meaning of the words "any part" of interstate or commerce is United States v. Yellow Cab Company, 332 U. S. 218 (1947), brought under Sections 1 and 2 of the Sherman Act. In that case the defendants obtained the control over the more important cab companies in New York, Chicago, Pittsburgh, and Minneapolis. These companies were forced by defendant's control to purchase their cabs exclusively from the Checker Cab Manufacturing Corporation of which the defendant had the controlling interest. This excluded all other manufacturers of taxicabs from 86% of the Chicago market, 15% of the New York City market, 100% of the Pittsburgh market, and 58% of the Minneapolis market. At the same time the trade of the controlled cab companies was restrained since they were prevented from purchasing from manufacturers other than

Checker Cab Manufacturing Corporation. The question never arose that the Government had to show that the defendants had a monopoly of all automobiles.

The Court said at page 225:

4265 "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce regardless of the amount of claims affected. United States v. Socony-Vacuum Oil Company, 310 U. S. 450, Note 59, page 225; Apex Hosiery Company v. Leader, 310 U. S. 469, 485. And Section 2 of the Act makes it unlawful to conspire to monopolize any part of interstate commerce without specifying how large a part must be affected."

The Court. That is what always gives me difficulty. By merely uttering the words, by saying it is a part of interstate commerce, it seems to me is not the answer to the problem. Don't you have to find what the impact on the public is as a result of that restraint?

For example, I collect first editions of an American author, Ernest Hemmingway. Does that mean if I slowly gather all those first editions that I am restraining commerce? Well, in fact I am in part. No one else can buy them. But the citation of that suppositious case which I gave, doesn't that show that the secondary and more important test is whether it is reasonable, whether it is a reasonable restraint?

Mr. Rennинger. Well, if your Honor please, we are charging here a monopolization of the cellophane field itself, your Honor, and to prove a monopoly we are here just solely concerned with a monopoly of the cellophane industry.

4266 The Court. In other words, you say you come clearly within the doctrine of the Aluminum case, that the mere acquisition of the manufacture and control of any particular product in and of itself is a monopoly per se?

Mr. Rennинger. That is right.

The Court. Then I don't get the significance of the emphasis you are placing on the Supreme Court announcements and the statements of one of the Judges as to even though it restrains a part of commerce it is illegal. What does that have to do with it if you are approaching this question on a monopoly theory?

Mr. Rennинger. If your Honor please, we are trying to show here the great lengths that the various courts have gone to.

The Court. To show what? Lots of courts go to great lengths on lots of things, but in this instance to show what?

Mr. Rennинger. To show——

The Court. Liberality of construction of the Act? You don't have to convince me that that is the fact, because it is the fact.

But I am trying to get your legal theory. That is what I am trying to get.

Mr. RENNINGER. We say as alleged in the complaint that the defendants have monopolized the market for cellophane alone.

The COURT. By maintaining in and of itself a monopoly
4267 ~ in a certain product.

Mr. RENNINGER. That is right.

The COURT. And you say you are not going to have your eyes drawn out of focus on that. You are talking about cellophane and nothing else.

* * * * * *

4291 Mr. GESELL. I think it would be well at the outset, your Honor, to be sure that the issue that is being argued today is understood.

The COURT. I think that is fundamental.

Mr. GESELL. By myself at least. I understood the argument to be addressed to this issue: Is it relevant and material on the Government's case to consider facts concerning the competition between cellophane and other flexible packaging materials? That is the issue that I am going to argue to. Is it relevant and material? And I say, of course, it is, and so that we may present to your Honor the grounds on which we say it is relevant and material, I would like to turn first of all to the complaint, which seems to me to be the proper starting place.

Paragraph 11 of the complaint, on page 12 of the print, says that cellophane is basically a thin, transparent sheet, primarily used for wrapping cigarettes, foodstuffs, and other consumer goods, and it is alleged that the characteristics of
4292 cellophane render it unique for these particular purposes. That is an issue of fact. Is it unique for those purposes or isn't it? We said it was not. They say it is. We say it is relevant to take facts to find out whether or not that is the case.
4293 If your Honor will turn to paragraph 23 of the complaint, the matter is brought into even sharper focus. That paragraph recites, at page 28 of the print, your Honor, five different powers which duPont is alleged to possess, to control the supply, to fix prices, to exclude others, and you will notice, to restrain competition at the distribution level of the industry. And look at the beginning recitals and the end recitals. duPont now has and has had for many years past virtually absolute control of the markets in the United States for cellophane—the wrapping, as paragraph 11 makes clear, of cigarettes, foodstuffs, and consumers' goods. And at the end there is this rather unintelligible but specific allegation which says that this market control and the monopoly powers have been self-sustaining and self-perpetuating.

Well, there are specific allegations that duPont possesses the power to control the prices and the supply and to restrain com-

petition at the distribution level of the markets in which cellophane is sold. We say that is not the fact. We say it is essential they prove it to be a fact. And one of the facts that disproves the allegation seems to us clearly to be the competitive conditions that exist in the market place.

Turn, if your Honor will, to paragraph 32. There are others, but this is sufficient to make the point. In discussing duPont and the various transactions in issue, it says that duPont has con-
4294 ducted its affairs in a manner to bar free access to the domestic markets for said products and to suppress the existing competition. Well, what is the competition? It is relevant to consider that.

If your Honor will turn to paragraph 35, you will see long allegations there about duPont and the alleged purpose of inhibiting potential competitors, and then as to price it says, at the bottom of 42, that duPont's price policy and practices have been directed primarily against domestic manufacturers of products similar to cellophane.

The COURT. Well, I do not get this point, Mr. Gesell. If they have laid a burden upon themselves to prove the allegations you have referred to and they offer no proof in that respect, then what concern is that of yours? It would seem to me to weigh in the balance in your favor. So at this time, in point of time, why do you have any anxiety because they are not going to bring in questions of secondary competition?

Mr. GESELL. Well, your Honor, our position, if I may develop one other aspect of the complaint and come to the answer to that, I can make it clear——

The COURT. Yes, sir.

Mr. GESELL. There is the issue here also of intent—intent. And there are allegations throughout here of wilful intentional conduct designed to exercise in a predatory way these powers.

With that additional comment on the complaint let
4295 me answer your question. duPont lowered prices. They are going to offer that as proof that those prices were lowered consistently, and therefore we had the power to control the prices of the markets in which cellophane is sold and that was intentionally a predatory act. I say that if the evidence shows as it comes in that duPont lowered those prices for the purpose of meeting the competition of the lower priced products that are sold in the same market and that compete, that negatives the intent, and it negatives the existence of the power. The Government says, "No, you cannot talk about the fact that in this market place there were operative conditions, competition, and factors that influenced or affected your conduct." We say we should be entitled to show it.

The COURT. That is my difficulty, Mr. Gesell, at the moment, as to whether you are or are not entitled to show it. The question is, when and at what place in this proceeding are you entitled to show it? Are you entitled to show it in connection with the Government putting in its case?

Mr. GESELL. We say yes.

The COURT. Would you treat that for a moment, because I am having difficulty with that proposition. I could see very well that you could marshall those facts where the defendant presents its own case. But you have given us a caveat that when the Government is finished you are going to move for judgment in
4296 your favor. And my difficulty is concerned with the procedural question as to how we review the facts you have mentioned in connection with the Government's case because in the earlier stages, Mr. Minicus I believe informed the Court that he has much material which he would enter in rebuttal in the form of counter proof in the event that you were permitted to adduce that proof in your case in defense. Did I understand you correctly, Mr. Minicus?

Mr. MINICUS. That is absolutely correct, your Honor.

The COURT. Therefore, my problem at the moment and my difficulty at the moment, is how I am going to review the question as to, with whom do you compete? How am I going to review that question in connection with the presentation of the Government's case?

Mr. GESELL. Here is the way I undgrstand the issues coming up. The Government offers a document and it shows that we engaged in some course of conduct. Let's take price reduction again because I think that is a good one to focus on. And we say, but they have not brought to your attention in that document, your Honor, the reasons why the prices were reduced. And we say that if their evidence is offered and it shows facts as to these competitive conditions in the market, it is relevant and material for your Honor to see those conditions in order to determine whether in fact the monopoly powers exist, whether in fact they are being predatorily exercised, to find out what the intent is.

4297 That seems to me the first position, that when the evidence is offered by the Government—and I am not adducing proof; the Government is—and when it offers evidence I am entitled to comment on it when it is relevant to the case. And they don't make it irrelevant by just saying, "We don't want that brought into our case."

Now, I say, secondly, your Honor, that they have the burden on their case of proving that cellophane is unique for the purposes that are alleged in the complaint and establishing what Mr. Ren-

ninger told your Honor as a matter of fact, but which I don't think they can establish, that cellophane doesn't compete with these other products. They can't simply carve out strawberry ice cream, your Honor, and say, monopoly. This is a question of business reality and fact and they have to prove what this part of the trade and commerce is and whether these powers exist. And my constant assertion is that they are not going to be able to prove it and they are trying to dodge their obligation of proving it.

The COURT. Well, if I understand your position, it is this: You want the right to comment on the documentary evidence which the Government offers. Now, is it as simple as this: The question is whether you comment on it as it goes in or whether you comment on it after it is all in and you move to dismiss it all.

Mr. GESELL. It seems to me that is what that issue
4298 is, and my feeling is that it is better to comment on it as it comes in so that your Honor can mark your exhibits and get its pertinence. It seems to me that part is just as simple as that. And I want to show——

The COURT. May I stop you, as I did Mr. Renninger, and direct a question to Mr. Renninger. You are handling this phase of the case, Mr. Renninger. Is it your contention that after all your evidence goes in, your 1,999 documents, that Mr. Gesell could not comment on that documentary proof and point out to the Court such material as it contained as he thought was of benefit to his case?

Mr. RENNINGER. To those things that are relevant, your Honor, he has the perfect right, of course, to comment upon. It appears that the defendant is trying to put his case along with the plaintiff's case.

The COURT. No. He disallows that. He says, "I am not putting in any proof." He says, "I am not going to put in any evidence. But I do want the right to comment on the documentary proof that the Government puts in." That is in the way of comment. Really it falls into the orthodox classification of argument. That is what it really is. And would he be restrained in his argument in support of his motion? I don't know what kind of a motion it will be. But would he be restrained?

Mr. RENNINGER. Your Honor, as we have contended
4299 all along, any reference to substitute materials of this nature is entirely irrelevant and immaterial.

The COURT. Well, he does not quite cross swords with you on substituted materials as such, because he has referred to the paragraphs in the complaint this morning as to what he relies on and how he interprets your allegations, and it is not the classic case of substituted elements.

Mr. RENNINGER. Of course, our paragraphs of the complaint are talking about the competitors in the cellophane industry, your Honor. Paragraph 11 is just a descriptive paragraph.

The COURT. I don't want to indulge in an argument with you but I just simply want to ask this question. When you say that the characteristics of cellophane render it unique for its particular purpose, do you mean he has not the right to show that that is not so by your very proof itself?

Mr. RENNINGER. If your Honor please, I want to first point out that paragraph 11 is a descriptive paragraph only. It is not a charging paragraph. We are not alleging that the defendants have done anything in that paragraph.

In the second place, as I stated earlier, our conception, or our use of the word "unique," is that it is a distinct commodity or product.

The COURT. Well now, here is what I have attempted to
4300 do. I have attempted to crystallize this issue, and I got it down, I thought, to the simple proposition as to whether Mr. Gesell should comment or not comment on your documentary proof. You say you do not care how much he comments but he cannot comment on what you consider to be irrelevant material. Is that the issue?

Mr. RENNINGER. Practically, your Honor. Under the Court decisions we contend that this material is entirely irrelevant and immaterial.

The COURT. All right. Proceed, sir.

Mr. GESELL. That is why I opened what I said, your Honor, by saying that this really is an issue of relevancy at this stage.

The COURT. Yes, I see.

Mr. GESELL. I pointed out that on the complaint it is relevant to a determination of what is the market, it is relevant to a determination of the existence or non-existence of these alleged monopoly powers, and it is certainly relevant to the issue of intent.

If I may, your Honor, I would like to underline these allegations of the complaint by referring to the opening of the Anti-Trust Division when they opened this case. And may I read to you just a few brief excerpts from the Government's own opening, which I think makes the issue clear.

The COURT. That was Mr. Minieus' discussion when we started the case at bar?

4301 Mr. GESELL. Yes, this case. Mr. Minieus speaking: "It is not too much to say that current interpretations of Section 2 present the central issue of doctrine in the entire field of anti-trust law, the concept of market control."

Then he goes on at a later point and says, "It was possible for the defendant to ignore the inter-play of influences present in a

freely competitive market and instead to fix its prices at a level designed to yield a consistently high predetermined margin of profit." They are alleging it was possible for us to ignore the interplay of influences present in a freely competitive market. We say if they will look at these facts that they don't want us to call to your Honor's attention, that it will show we had a freely competitive market.

Then he goes on at another point: "The problem of market control perforce necessitates resolution of a variety of economic conditions attendant upon the industry. The character and nature of the market place and its participants must be ascertained." Well, isn't that what we are talking about? Who are the participants in this market place? What was the character and nature of it?

Finally he ends up: "This economic analysis of the position of the defendant in its particular market setting is the key to measuring the degree of its control."

Now, aren't those statements, your Honor, tied to these paragraphs of the complaint which I mentioned a moment ago,
1362 a clear demonstration that the Government has specifically placed in issue on its case the question of this market, cellophane's relation in it, what the other products are, how they compete, what powers exist? And I say that those statements and the pleadings alone, before we come to any of the cases, which I am going to review with the Court, make it very clear that the question of the competitive factors in this market is relevant to the determination of this monopoly charge. The idea that you can ignore the realities of the market place and set up in the complaint arbitrary facts and then assert them to be true without proof is one I am sure that the Court will not accept. Each of these cases present peculiar problems on its own facts, and each of them must be dealt with as a factual matter, and the idea that before we ever get to this evidence we can exclude the business realities and say we are not going to pay any attention to the fact that side by side with cellophane are these other materials that are functionally interchangeable, that cost less, that are more established in the market, that are sold at the same time, through the same channels, to the same customers, for the same uses, and that duPont was trying to enter that market and compete with those other materials; and that it only has now less than 20 per cent, and that we can walk into this courtroom and ignore all of those facts,
your Honor, and say, it is monopoly, it is domination, it is
1363 power, it is influence, is something that cannot be done on the pleadings and on Mr. Minieus' own opening unless they want to amend their complaint and withdraw their position.

This is all part of the Government's motion that this case can be proven statistically—78 per cent cellophane is the market, and that is all they have to do. And on their pleadings they have not tendered that kind of a case, and on the authorities it isn't that kind of a case, and the facts and the business realities won't permit it to be that kind of a case. That is not the kind of thing cellophane is.

If I may turn to the authorities, I want to come back to some of the cases that Mr. Kenninger mentioned. But did your Honor observe one thing about those cases as we went through them, that in every case the Court was considering evidence which had been admitted on the trial? In every case the Court was disposing of contentions that had been made about the market place, but these were not cases of decision reached after some argument such as this midstream or at the beginning of the case; these were all cases where the Court sat down on the evidence and said, "We have looked at it and we think because of these factors it was not sufficiently persuasive in this case" or "It was sufficiently persuasive in this case, but in all of them the evidence came in. And all we are arguing here is whether or not the evidence is relevant. And in all those cases whatever the result was reached by the Court, the evidence was in, and this notion that you can
4304 take a pair of scissors and cut out paragraphs of our documents, in effect, and not consider those when the Government themselves are offering them flies right in the face of the fact that in this whole parade of cases we had from the Government the evidence was taken.

4305 Now, what about this question of market control and power? I think it is clear from the decisions that that is at the root of any monopoly case. It is most succinctly stated in the U. S. v. Griffith case in 334 U. S. where the Court said, "Section 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control." That is why the complaint talks about effect market control. That is why Mr. Minicus talks about it and we want to talk about it in the light of the business realities. Where it suited their purposes a little differently in the Columbia Steel case, your Honor will recall what the Government said in its brief to the Supreme Court there?

"Products performing the same functions but differing somewhat in their characteristics may be just as competitive as products which are identical."

Now, what have the courts done with this issue? We say in all of them they have recognized the necessity of looking at all of the facts and determining what is the market. There are extremes on both sides, your Honor. There is the one, the straw-

berry ice cream extreme on the one side, or the Wilbur Buds that we had before. On the other extreme there is the one that Mr. Renninger likes—mining. All kinds of metals in the ground are the same. We are not arguing either of these positions, but we are saying that this question of the determination of the market
4306 is a question of fact and degree to be determined in each case in the light of its own particular facts.

Let us look at cellophane a minute, and I am referring to matters only in your Honor's every-day experience. In point of fact there is some competition between cellophane and bottles. You will find peanuts in both. Or between cellophane and tin cans, between cellophane and very heavy boxes. Those are substitutes that, as a matter of degree, to us seem too far removed; but when you come to these particular flexible packaging materials that are handled through the same distributing channels, that run through the same packaging machines, that are used side by side, as you can see if you go into any super-market or anywhere else, we say as a matter of degree those must be taken into account, and that on the facts of this case that is what your Honor will conclude, and there is substantial evidence in the Government's proposed exhibits which show the nature and extent of that very competition.

In the cases the courts have said—the latest is the Columbia Steel case—that it has recognized that it is a difficult matter to set down a particular rule as to what will determine the market, but the Columbia Steel case said any monopoly case requires consideration of what is "the relevant competitive market"; any monopoly case requires that, and there, of course, the parties were in sharp dispute as to the size and the nature of the market for rolled
4307 steel products, and the evidence was taken. In the Aluminum case the same situation existed and the evidence was taken. The reason there is no rule, your Honor, is that in business life the situations are different depending on the product and the market place and the period of time and the other considerations involved. In this case, in the lights of these facts, it is clear that cellophane does meet competition in an obvious market that we all know of from our every-day experience, and we want to bring that out as the Government's proofs come in, not by adducing our proof ourselves, but by pointing it up to your Honor and making it clear and showing what our intent was and what the circumstances in the market place were.

If we brought these prices down to meet the competition of other materials and to expand our own volume so we could make further price reductions, that is different than if we brought our own price down with the direct intention and purpose of affecting some other cellophane manufacturer adversely.

It has been repeatedly said that the Sherman Act deals with economic realities, and that is what we are talking about; and the notion that this arbitrary, initial, a priori definition of the market and the product can be carried through is one that we are resisting. We have already seen it shatter apart. It has
4308 already been developed that we have two markets—at least two markets. The Government has now conceded that, though their complaint talks of it as one. We have caps and bands with particular situations in those markets and cellophane with particular situations in those, and we have also got it clear that cellulose sponges, though made side by side with caps and bands, are in a different market, and that is excluded from this case. The Government does not want to talk about sponges.

So already as this case has come in—and we haven't yet come to grips with the monopoly part of the case—the case is breaking down where you see different markets, different products, different distributing problems, and the case to come, your Honor, broken down into these major headings that lie ahead, is going to deal with distribution problems in great detail. And isn't it an important consideration in determining how and why duPont sold cellophane to know what it was competing with, what conditions it was meeting in the market place, and why should that be excluded from the Court when it is in the Government's exhibits? It bears on our motives and our intent and reasons why
4409 give you a few of them, your Honor.

All through the Columbia Steel case we found the phrases which make it clear that "any part," the words of the Act, must be construed consistently with the main purpose of the monopoly inquiry to determine effective market control. I will just
4309 give you a few of them, your Honor.

They talked about the relevant market to consider—the competitive area and products for consideration—a proper market for measuring competition—the relative competitive market. Now, what are those phrases but an indication of the Court's inquiry into the very thing I am urging on your Honor to make in this case on the Government's case?

Judge Hand in the Aluminum case went through this process in great detail to consider whether or not secondary aluminum was within or was not within the market said to be monopolized, and he considered price factors and other factors to determine that market; and in the Corn Products case he considered at great length these other materials and finally decided that he would not take them into account because they had a distinguishable use value and a higher cost of production. Of course, in this case our products do not have a distinguishable use value and are lower priced. But he considered those things, the evidence was

taken, the matter reviewed and discussed in his decision, and he reached a judgment on the facts.

The COURT. In short, if those matters are relevant for the Court's examination and consideration, it is not your argument that they are controlling at this point.

Mr. GESELL. I think I need only go to the question of relevance, because that, I understand, is all that is before the Court now.

4310

The COURT. Yes.

Mr. GESELL. I think the Government must prove—and in this sense they are controlling, your Honor—they must prove the allegations as to cellophane that they have made. I think they will fall short of it because they can't prove its uniqueness, and they can't prove its market control, and they can't prove the power. To that extent I think they will prove to be determinative, but I don't argue that now because all I am arguing is that as this evidence comes in I am entitled to call your Honor's attention to these facts, and that that is what has been done in every Sherman Act case that has come along.

Take a look at what Mr. Renninger said for a moment in connection with that:

These were all issues of fact he based in support of his argument. When he said that cellophane is unique in its characteristics, that consumers look to duPont, and that the uses of these products are not coextensive, where is the evidence? Those are fact issues. He talked a lot about why products are substituted: he said shortages, consumer preference. Well, are those the conditions why they are substituted or are there some other reasons why they are substituted and don't the have to prove it instead of just talking to your Honor on their a priori assumption? To end up and say, "We just say cellophane" is to ignore the

4311

market realities that they have to first prove, and in that sense it is determinative.

The COURT. How do I know that cellophane is not a substitute for something else?

Mr. GESELL. You don't on the evidence the Government is trying to offer. You see, these statistics that they are coming to, your Honor, are all geared to this assumption, and now they are confronted with the market realities and the statistics are not going to jibe, and they want their statistics; but I say they have to make their proof first.

4312

They admitted on the argument that these products compete—at least they seemed to; you will have to check the transcript to be sure how that came out—but it sounded to me as though they said they competed. And your Honor's experience will tell you they compete because you see them side by side in the

market place. Now, aren't we entitled in this case to show those facts as they come in on the Government's exhibits, and if those exhibits show the conditions to be what I say they are, to ask for a dismissal of this case on the ground of failure of proof? Why must we be put to the expense and the burden and the time and the effort of marshalling these economic and business facts if on their own exhibits they turn up, and on their own exhibits they defeat their case. And why must we cut and blank this out so I cannot talk about it? It must be because they are concerned about their case and their inability to prove a prima facie case.

The COURT. We will take a luncheon recess now until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m. of this same day.)

4313 2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

The COURT. Off the record.

(Discussion off the record.)

Mr. GESELL. Your Honor, as far as my argument is concerned, I have terminated. I simply want to at the conclusion point up what I understand to be the issue before us. The Government has asked that the Court exclude as irrelevant evidence that it offers as to the nature and extent of the competition between cellophane and other materials and it asks that duPont be directed not to comment upon such evidence as it comes in and be barred from discussing it at the close of the plaintiff's case when weighing what the plaintiff has proven. And it asks that any reference to it in the exhibits that have come in or are going to come in be stricken and that all my comments be stricken.

Those are the issues I have directed my argument to, and we ask that the Court deny the Government's motion to strike and its other requests in toto.

The COURT. Mr. Renninger.

Mr. RENNINGER. If your Honor please, just a few minutes.

I would like to talk briefly about various paragraphs
4314 of the complaint that were brought up during the course of Mr. Gesell's argument.

Paragraph 11 of the complaint, which is found on page 12 of the comparison of answer and complaint, reads as follows:

"Cellophane is basically a thin transparent sheet primarily used for wrapping cigarettes, foodstuffs and other consumer goods. It is also employed in the manufacture of decorative ornaments and has numerous military purposes. Cellulose caps and bands, hereinafter referred to by the terms caps and bands, are used principally as secondary bottle closures, particularly by the distillers industry. The characteristics of cellophane render it unique for this particular purpose."

As I explained before, your Honor, this is purely a descriptive paragraph, to instruct on the uses of cellophane. It does not charge anything. The use, primarily use, is a wrapping material. That is not the only use as has been brought out. And as I have stated before, what we mean by the word "unique" is that it is a distinct product or commodity.

Paragraph 22 of the complaint is found on page 28 of the comparison of answer and complaint. I do not intend to read this paragraph in its entirety, but as you will see, we are describing here, or discussing here the market for cellophane and
4315 caps and bands, and the powers referred to that Mr. Giesell seemed to lay so much stress upon are addressed to those particular markets, cellophane and caps and bands, and not to the markets of the package industry field.

Paragraph 32, your Honor, I would like to read in full as it was not read in full by Mr. Giesell. This paragraph reads:

"At all times during the period of time covering the violations of law herein alleged the defendant has conducted its affairs pursuant to a policy designed to exclude domestic and foreign interests from the manufacture of cellophane and caps and bands within the United States, to bar free access to the domestic markets for said products, and to suppress the existing competition. The objectives of said policy have been accomplished by means of understanding, agreements, practices and other acts and things hereinafter more fully described."

We are talking here about certain potential competitors—potential because they possess the basic know-how, as viscose rayon manufacturers, or viscose sausage casing manufacturers. This paragraph is directed entirely to exclusion and obviously does not attempt to define the market. As expressed in the complaint, the monopoly charged here is a monopoly of the manufacture and sale of cellophane and caps and bands. The product is cellophane. The defendant is now attempting to broaden this concept to include many other products. We feel that we
4316 have only the burden of proving our complaint as alleged.

If the defendant is of the opinion that our complaint does not allege a violation of the Sherman Act, we feel that he should have moved to dismiss the complaint at the proper time. At this late stage to impose upon the plaintiff a burden of proof beyond the allegations of our complaint, to wit, monopoly in the manufacture and sale of cellophane would be a precedent.

Relative to the market, as I think I have definitely made clear to your Honor, we have set our market. It is a market in which cellophane is bought and sold. It is a fixed, definite market. The defendant offers no determinable market. Mr. Giesell talks of flexible packaging materials which he does not identify. The

defendant's answer names some various packaging materials. Mr. Gesell has added various other ones in addressing the Court from time to time. Where is the end of this? To what indeterminable lengths will the defendant attempt to go? Will we have to prove that cellophane was or was not a substitute material for all these other items? And as I pointed out, and as the complaint shows, cellophane is not limited to the packaging industry.

4317 Is the Government to take upon itself the burden of proving that everything which is flexible and is used to wrap products is not in competition with caps and bands? We feel that the Government is entitled to put in its case according to the theory of the case.

I would like to call your Honor's attention again to the Rostov article which I re-emphasize:

"The Court has lately been emphasizing the availability of Sherman Act considerations in small segments and subdivisions of the economy. When the Court talks of 'monopoly power' it seems to mean a rather limited degree of economic control in highly particularized markets."

This is what the plaintiff has done. The market as charged in this complaint is a particular market, well described and definite.

None of the cases that Mr. Gesell has cited has changed the conception of the meaning of the word; and, as your Honor knows, the Columbia Steel case was finally determined in favor of our contention that we are espousing at this time.

The COURT. Upon re-consideration I have concluded I don't want briefs or other written memoranda.

The reporter informs me that I shall have this argument transcribed and on my desk by tomorrow morning. I shall try to find time after the receipt of the argument as transcribed to read it before we commence our next session. However, because

4318 it will be helpful to me, I would like each side by Monday sometime to put in written form the question presented for determination—that is, the question as it seems to each side, and that is all, and then underneath that a proposed answer as it seems to each side as to how that question should be answered. I don't want argument. I just want the bare statement of the question and what the answer should be. Can I have that sometime Monday? I will be here all day Monday.

Mr. MIXTER. We will, your Honor.

* * * * * * *

4329 Mr. TURNBIDY. We are coming to 13 and 14, sir. This is D, "The world-wide cartel in cellophane." Then that finishes this particular section of the case.

The Government offers in evidence Exhibit 1333, which is a

letter from Mr. Crane, European Manager, to Mr. Haskell, dated 11th September 1925, captioned "Transparit."

(Letter from Mr. Crane to Mr. Haskell, dated 11th September 1925, was received in evidence and marked "Government's Exhibit No. 1393.")

Mr. Turnbull. It reads:

"As requested I brought up the question of their material similar to Cellophane, and Dr. Aufschlaeger stated that this was made by the firm of Wolff & Company, at Walsrode, which is controlled by the Koln Rottweil Co. They suggested that they would get Dr. Wolff to come right to Hamburg or Berlin to meet with me, but he was away on a holiday and could not be reached.

"I talked the matter over thoroughly with Dr. Duttenhofer, and Prof. Flechtheim, who had not previously understood that we made cellophane in connection with the same French interests as we made Rayon. When this was appreciated by them they felt that the only thing to do would be what we had previously discussed—to determine whether a basis could be found for cooperation on Rayon.

"They had already expressed willingness to discuss
4330 these matters with our French associates, and I had put the matter up to Mr. Gillett and Mr. Bernheim, and when I was at Hamburg I was awaiting their reply. Dr. Duttenhofer stated that as we were to cooperate in other matters it would be a pity to compete in artificial silk and cellophane. Returning to Paris I got in touch with Mr. Bernheim and was pleased to learn from him that they were ready to meet our German friends and asked me to make an appointment for them.

"The situation therefore now stands that I am to arrange a meeting between the Comptoir officials and the Koln Rottweil people, probably about the middle of October.

"I presume that I shall be expected to attend these meeting as 'unofficial observer', and to bring the parties together. You will know whether a representative of the duPont Rayon Company, and of the duPont Cellophane Company, would like to attend this meeting. It may come to nothing but the purpose of it is to see whether a basis could be found for cooperation between these two groups in Europe.

"I am reporting more fully on this matter directly to Mr. Yerkes and will appreciate your advice of the line I should take with regard to the duPont interests.

"My fundamental idea is that our German friends have undoubtedly some interesting technical developments in viscose and it would be a desirable thing to work with them.

"Jasper E. Crane."

4332 The Government offers in evidence Exhibit 1395, a letter from Mr. Irenee Du Pont, to Mr. Yerkes, dated May 25, 1926.

(Letter from Mr. Irenee Du Pont to Mr. Leonard Yerkes dated May 25, 1926, was received in evidence and marked "Government's Exhibit No. 1395.")

Mr. Tumulty: It reads:

"Dr. Wolff, of Walsrode, Germany, has communicated with us on the subject of Smokeless Powder. In his letter he writes:

"'In case I come over to the U. S. A. it would be an oppor-
4333 tunity to discuss, also, the question of our Transparit, the competitor of your Cellophane.

'We are manufacturing now the Transparit in the quantities provided and a good part of it goes, or will go, to the U. S. A.

"It seems that the American market takes up all we will furnish at normal prices and we are anxious to keep up these and not to spoil the market, but it is perhaps useful that we come to an understanding with your company as to selling prices.'

"Of course, we cannot have any understanding as regards selling prices but it may be that you will have some thoughts on the matter which will enable us to reply more fully to that phase of his inquiry."

The Government offers in evidence Exhibit 1396 from Mr. Du Pont to Mr. Haskell, dated June 2, 1926.

Government's Exhibit 1396

(Letter from Mr. Irenee Du Pont to Mr. Haskell dated June 2, 1926, was received in evidence and marked "Government's Exhibit No. 1396.")

Mr. Tumulty. It reads:

"Attached is Yerkes' letter on the subject of Cellophane and Transparit.

"Would like you to think over how we should answer Dr. Wolff's communication which carried a paragraph on the subject of Transparit."

The Government offers in evidence as part of
4334 Exhibit 1396 a letter from Mr. Yerkes to Mr. Du Pont dated May 27, 1926.

(Letter from Mr. Yerkes to Mr. Irenee du Pont dated May 27, 1926, was received in evidence and marked "Government's Exhibit No. 1396.")

Mr. Tumulty. It reads:

"Your letter of May 25th regarding the Transparit market in America and Dr. Wolff's recent letter to you. Just as a matter of information, I was told recently in Germany by Kalle and

Company, who purchased the German rights for Cellophane from the French company and who are now manufacturing at Weisbaden, that Wolff and Company were selling transparit in Germany at a cut price. I reported this to Dr. Fletchtheim, and he advised me that he would talk the matter over with Dr. Wolff immediately.

"As to the American situation, we would be very glad indeed to discuss the matter with Dr. Wolff if he comes over here, and naturally would be more than pleased if he does not cut our price. Frankly, however, I have very little faith in their not cutting our price. The German product we do not believe is quite as good as ours, and I doubt very much if they can sell very large quantities over here except at a cut price.

"As a matter of fact, Dr. Wolff suggests the continuation
4335 of the present Cellophane price. This undoubtedly yields them a very handsome profit, even though they have to cut our price slightly. It is my own opinion that our present Cellophane price is too high and that as we widen the market and enlarge our sales it would be very much better for us to reduce our price and keep out, if possible, all foreign importations."

4336. The Government offers in evidence Exhibit 1397 dated July 21, 1926, from Mr. Duttenhofer to President Lammot duPont. Mr. Duttenhofer, I believe, sir, is I. G. Farbenindustrie.

Mr GESELL. I move to strike the exhibit as not from any alleged co-conspirator.

Mr. TUBRIDY. May I call your Honor's attention, sir, that the following letter is addressed by Mr. Lammot duPont to Mr. Duttenhofer, Exhibit 1399.

Mr. GESELL. That hardly makes the statements of Mr. Duttenhofer admissible against duPont.

The COURT. Let us take it up in an orderly fashion. You have made an offer and there has been an objection. State the purpose.

Mr. TUBRIDY. Sir?

The COURT. There has been an offer and an objection. Now state the purpose of the offer.

Mr. TUBRIDY. The purpose of the offer, sir, this gentleman is from I. G. Farbenindustrie. I. G. Farbenindustrie had a controlling interest in Wolff and in Kalle & Company. They owned 80% of Wolff and I think they wholly owned Kalle.

The COURT. I still don't see the purpose.

Mr. TUBRIDY. I. G. Farbenindustrie, sir, if they are controlling these groups, there is discussion back and forth with regard to arrangements to be entered into between duPont and Wolff or duPont and Kalle, and certainly this gentleman is
4337 speaking for Kalle and Wolff & Company who are co-conspirators. Corporations can't speak for themselves.

The COURT. I will hear the objection, Mr. Gesell.

Mr. GESELL. My understanding is that this gentleman was not even connected with I. G. Farben, but with a company known as Koln Rottweil, and the various facts that Mr. Tubridy has recited as to I. G. Farben's relations with Wolff and these other companies are not shown on the face of the exhibits at all. But I don't know that there is any evidence as to who this man is. Why should his statement come in against us?

Mr. TUBRIDY. Very well, sir, if you want us to subpoena Mr. Lammot duPont and ask him who it is to prove who this gentleman was, we can do that.

The COURT. Let us take a look at the documents and see what the pertinency is.

Mr. TUBRIDY. If he is from Koln & Rottweil, sir, I call your attention to Exhibit 1393, which states in there that the firm of Wolff and Company is controlled by Koln & Rottweil Company.

The COURT. Objection overruled. Proceed, Mr. Tubridy.

Mr. TUBRIDY. Thank you, sir.

(The letter from Mr. Duttenhofer to President Lammot duPont, dated July 21, 1926, was received in evidence and marked "Government Exhibit No. 1397.")

Mr. TUBRIDY. The document is from Mr. Duttenhofer
4338 to President Lammot duPont, Wilmington, Delaware, dated July 21, 1926:

"MY DEAR MR. DUPONT: From the conditions arising out of the fusion with the I. G. Farbenindustrie A. G. the question of cellophane among other things plays a special role. Mr. Irenee duPont showed a strong interest in cellophane during his visit last fall and visited the Walsrode factory belonging to the firm Wolff & Company. The Messrs. Wolff make cellophane by a special independent process protected by patents. Mr. Irenee duPont has on his own account already endeavored to bring together Messrs. Gillet and Bernheim with Messrs. Wolff to bring about cooperation in the cellophane field. The negotiations conducted in Basle have led, however, to no positive result. Since then, now that the I. G. Farbenindustrie A. G. comes into a relationship also with Firma Wolff & Company, Walsrode, the gentlemen of the I. G. Farbenindustrie A. G. who are engaged in the question of cellophane wish to approach the Gillet Bernheim group anew, in order to try to bring about an understanding in cellophane. I can well assume that you also are in favor of such action and I beg to submit you the request to use your influence for an understanding whenever the French group will approach you.

"With best regards, I am

"Faithfully yours,"

The Government offers in evidence Exhibit 1399, dated August 19, 1926, with initial L&duP in the lower left hand corner, and the title President on the right hand side of the page.

(The letter to Mr. Duttenhofer from L&duP, President, dated August 19, 1926, was received in evidence and marked "Government Exhibit No. 1399.")

Mr. TUBRIDY. It reads:

"Dear Dr. DUTTENHOFER: Your letter of July 21st is received and I agree with your thought that it is desirable for your group and the French company to co-operate in the field of cellophane. Indeed with your new association, that would seem to be a very logical development, inasmuch as the process operated at Biebrich"—that is Kalle's location—"was, we understand, acquired from the French company. We presume that inside of your own company you will now decide upon the relationship between the Biebrich process and the Walsrode process"—which is the Wolff process—"and we understand from your letter that you will then approach the French company so as to effect an understanding with them. Whenever they mention the matter to us we will be glad to assist in the endeavor to reach a broader understanding.

"With kindest personal regards, I am

"Yours very truly."

The Government offers in evidence Exhibit 1400, a letter dated June 21, 1927, from Henry Blum to Albert Blum.

(The letter from Henry Blum to Albert Blum dated June 21, 1927, was received in evidence and marked "Government Exhibit No. 1400.")

Mr. TUBRIDY. It reads:

"At yesterday's meeting, in Wilmington, Rene Bernheim's letter of June 7th, addressed to Yerkes, was read. This letter, he states, was written in your presence and dictated by you and him jointly. It is a rather involved letter dealing with the Transparit situation on the one side and with the question of the duPont Cellophane Company obtaining a participation in the new American Film Company on the other. Yerkes will study these questions on his return to Buffalo and undoubtedly answer Rene himself.

"As regards the Transparit question, the main thing that was discussed was the Cellophane patent situation in the United States. You will remember that, before your departure, we had a meeting with Spruance and the duPont patent attorney, Mr. Biesterfeld, in which the advisability of taking steps to strengthen the situa-

tion was discussed, and it was decided that Biesterfeld and Pritchard should use their best efforts to do so. Since then it appears that not much headway has been made in this direction and I herewith enclose copy of communications from Biesterfeld and Spruance which indicate that there is not much hope of
4341 strengthening the patent situation. I did not send you these letters before because I was awaiting more definite information regarding the subject, but at yesterday's meeting Spruance told me that it was important that you should be posted on this patent situation so that you and our European associates should understand that there is little or no hope of strengthening our patent protection.

"I again refer to my letter to you of the 17th inst. in which I enclosed copy of Yerkes' letter to Spruance regarding the possibility of the American Viscose Company and duPont Rayon Company joint enterprise in acetate. This matter was discussed at length at the meeting yesterday and seemed to be quite favorably received by some of the members of the Board, particularly Walter Carpenter. It is of the utmost importance that you find out at once from our French friends what they think of the Yerkes tentative proposition and whether it would be acceptable to the Rhodiaseta people. In fact, as soon as you find out, your might cable me, without mentioning the names of duPont and American Viscose, letting me know whether the idea was favorably received or not.

"There is nothing more for today. I shall write you by next mail."

The Government offers in evidence Exhibit 1401, a letter dated June 24, 1927, from Mr. Blum to Mr. Yerkes, with the attached letter.

(The letter from Mr. Blum to Mr. Yerkes dated June 24,
4342 1927, with attached letter, was received in evidence and marked "Government Exhibit No. 1401.")

Mr. Tunney: This states, "Enclosed please find extract from a letter I have just received from Albert which seems to show that he had been working for a better understanding between the French and Courtaulds.

"This is in line with the ideas that you expressed at the last meeting."

The attached letter:

"As regards Cellophane, they are all relying upon the proposed increase in duty in the U. S. as the effective weapon both against Transparit and Belgian Cellophane, as they claim that neither of them is making any headway in the European markets.

"As far as litigation against the Belgians, it is a slow affair. They are handling two distinct suits against Rey, the one on the patent and the other for stealing secret information. My own impression is that the cases will drag on without any satisfactory results.

"I am enclosing copy of a letter from Rene to Yerkes upon the former's return from the Frankfort meeting last week which both Swint and myself had refused to attend.

"If we get the proper increase in duty I feel that we will be secure for quite a time, as the field in the U. S. is not big enough to induce either party to build a plant.

4343 "I am also enclosing copy of another letter regarding Sausage Casings.

"Bernheim and Gillet also talked to me about the waterproofing process for the Germans and, acting under Yerkes' last instructions, I refused to press the matter at home unless duPont Cellophane received the right to subscribe to the American Film Company on the same basis as the Germans and the French. This will explain my inquiry by cable as to various costs of films.

"They are all feverishly enthusiastic about this film business. I have no opinion, but feel that we might as well get in on the ground floor.

"With this in view, I coached Rene before his departure for Frankfort and we here are all hopeful."

I will skip the next paragraph and read the following paragraph:

"One week ago I met Lunge of the Courtaulds Co. at luncheon at his request, through the courtesy of Marx (Basle and Paris). We were alone for 4 hours. He was most complimentary about Yerkes and duPont, quoted Salvedge as to his pleasant relations with our group, maintained that the Snia exports to the U. S. A. would dwindle far and from June on, expressed his lack of confidence in Celanese or any other acetate silk for big business. We seemed to get along very well and I talked him about the
4344 Comptoir, the last suit over Celta in England, and expressed my surprise at the lack of entente between his group and Comptoir. He answered: You and I talk the same language and could easily fix this up. He then outlined his ideas, such as stopping the Celta suit, dividing its costs, splitting the Calais plant 50-50 and then getting for his company an interest in the various Comptoir ventures. He left for Italy to return about June 20th. I repeated all to Alfred and Rene Bernheim, Edmond being absent on a holiday until June 17th. The old man said he was not

surprised for Lange and myself did talk the same language and often a third party could bring about an entente, and he is anxious to have the matter followed up. The next few days will tell with Edmond here and Lange appearing on the scene."

I will skip the next exhibit, 1402. It has been offered in evidence at page 533 of the transcript.

The Government offers in evidence Exhibit 1403, a letter dated August 8, 1929, from Mr. Yerkes to Mr. Rene Bernheim.

(The letter from Mr. Yerkes to Mr. Bernheim dated August 8, 1929, was received in evidence and marked "Government Exhibit No. 1403.")

Mr. TUBRIDY. In the upper left hand corner is a brief "Note for General Managers: Please issue proper instructions to anyone who may have correspondence with Kalle that is in any way
4345 out of the routine, to advise me and keep me posted."

It reads:

"As you know, I wrote to Kalle & Co. early in July asking them the following questions:

"1. What, approximately, is Wolff & Co.'s total output?

"2. How many casting machines have they?

"3. Are all of these casting machines still of the belt type?

"4. At what capacity per hour do they run?

"5. Do you consider Wolff's product equal to or better than your own?

"6. Do Wolff sell at the same price as you do?

"Their answer has just been received and it is practically a curt refusal to answer any of these questions.

"I am very much upset about this situation. If our technical agreement with Kalle & Co. is going to work in a one-sided way, I am afraid it isn't going to work at all.

"Wolff & Co., as I understand the matter, is an active competitor of Kalle in Germany and a prospective active competitor of ours, and I think the questions listed above are entirely legitimate. I understand fully that the I. G. have some control of Wolff, as well as entire control of Kalle, but I do not think this has anything to do with the matter.

"The only possible reason I can see for Kalle refusing to answer my questions is that there is a possibility of Wolff
4346 becoming a competitor of ours in this market. If this is true, it makes the situation look worse in my opinion. It would simply amount to a supposedly friendly collaborator of ours (Kalle) taking the position of helping a competitor of ours in this country.

"The whole situation is most disturbing and we shall have to be guided accordingly in future information sent to Kalle. I have

no objection whatever if you care to send a copy of this letter to them.

"Yours very truly."

The Government offers in evidence Exhibit 1404, a letter dated August 29, 1929, from Kalle & Company to Bernheim.

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4354 The Government offers in evidence Exhibit 1407, letter dated October 17, from Mr. Yerkes to Mr. Bernheim.

(Letter from Mr. Yerkes to Mr. Bernheim dated October 17, 1929, was received in evidence and marked "Government's Exhibit No. 1407.")

Mr. TUBRIDY. It reads:

"The S. I. D. A. C. Company are going ahead with their building in Fredericksburg, Va., and expect to be operating in March or April of next year.

"It is our understanding that they are putting in two casting machines, with buildings for six or eight.

"We know Dr. Wallach—" that is the president of Sylvania, sir—"and if there is any other specific information you would like to have we may be able to get it for you.

"Yours very truly."

Mr. GESELL. May I interpose a moment at this stage, your Honor?

The COURT. Yes.

Mr. GESELL. We are now starting again a series of documents relating to the Sidac controversy, which your Honor will recall some days ago we went into in some detail, and I thought it would be of aid to the Court if I handed up an organization of these new exhibits related chronologically to the ones we have already discussed. You will find that some of them answer letters

4355 that we had already discussed, and some of the ones we discussed earlier answer the ones that are now being put in. I have arranged these Sidac controversy letters and the resulting agreement with La Cellophane in chronological order by exhibit number, showing the pages where the others were introduced, and it may be of assistance to your Honor in relating the documents. I will hand one of these to Mr. Tubridy.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1408, which is a letter from Mr. Bernheim to Mr. Yerkes dated October 28, 1929.

(Letter from Mr. Bernheim to Mr. Yerkes dated 28 Octobre 1929, was received in evidence and marked "Government's Exhibit No. 1408.")

Mr. TUBRIDY. It states:

"We acknowledge receipt of your lines of October 17th giving us some information regarding the activity of the American Sidac Co.

"Having seen a few days ago the President of the Belgian Sidac Co. we have cabled and written Mr. Blum and no doubt when this letter will reach you Mr. Albert Blum will have given you all details with regards to the interview we had with this representative.

"We now await your reaction so as to continue negotiations if at the time of your answer things are not broken off.

4356 "We, of course, do not know if the Board of Sidac will follow their President in the conditions which he seemed prepared to accept."

Document 1409 is already in evidence, sir, under No. 1007.

Mr. GESELL. Your Honor will see I have referred to that as the third one on this schedule, which illustrates how this works.

The COURT. Right.

Mr. TURNBULL. I might just mention what that is, your Honor. That is the one where Mr. Gillet advises Mr. Blum about Mr. Van Ham of the Sidac Corporation coming to him.

The Government offers in evidence Exhibit 1410, letter dated November 19, 1929, from Mr. May to Messrs. Carpenter, Pickard and Blum.

Government's Exhibit 1410

(Letter from Mr. May to Messrs. Carpenter, Pickard and Blum, dated November 19, 1929, was received in evidence and marked "Government's Exhibit No. 1410.")

Mr. TURNBULL. It reads:

"The enclosed memorandum having reference to the 'Cellophane' situation has developed from the Belgian Sidac's conversation with the French and is simply a recording of the various ideas and suggestions made at the discussion held on November 14, 1929.

"This memorandum can be used in any further discus-

4357 sion which you may have of this question."

The attached document reads:

"There was a discussion this morning between Messrs. F. W. Pickard, Henry Blum, W. S. Carpenter, Jr., L. A. Yerkes and B. M. May, and subsequently between Messrs. L. A. Yerkes, J. E. Hatt, C. W. Phillis and B. M. May, in reference to the position of the Du Pont Cellophane Co. in relation to the Belgian Sidac's advances to Mr. Gillet in regard to the future activities of the Belgian Sidac and their influence on the Sylvania Industrial Corp., their American subsidiary.

"The Belgian Sidac is apparently ready to make reparations to La Cellophane for the pirating of their patents and know how in Belgium and also to make reparations to the Du Pont Cellophane Co. for damage done to it as a result of the sale of Sidac's product made under the French processes in the American market for which Du Pont Cellophane Co. had bought exclusive rights and processes from the French, which Sidac has pirated.

"The Belgian Sidac will turn over to our French associates 35% of the stock in the Belgian Sidac as reparations for damage done directly to La Cellophane. By the acceptance of these shares, La Cellophane becomes indirectly interested in the sale of transparent wrapping material in the United States, because the Belgian Sidac is the majority stockholder in the Sylvania Industrial Corp.

4358 The presence of the La Cellophane interests in the American market by this indirect route would probably constitute a violation of their contract with Du Pont to give this market to the latter exclusively.

"The apparent willingness of the Belgian Sidac to in turn make reparations to Du Pont brought about a discussion as to how Du Pont could accept reparations and at the same time protect its future position without contravening American statutes.

"It has never been entirely clear to us as to the real reason for Belgian Sidac's approach to Mr. Gillet. If the approach was primarily because of Sidac's losing position in the patent suit the position of Mr. Gillet may be much stronger than would be the case were the approach made simply for the purpose of effecting a commercial and technical agreement.

"It was suggested by Mr. Pickard that we might accept a 35% interest in the Sylvania Industrial Corp. in the form of non-voting stock. It was thought by taking reparations in the form of non-voting stock that we might avoid criticism, because the non-voting stock would carry no voice in the management.

"It was then suggested by Mr. Carpenter that we might gain our objectives thru licenses under the patents, under which the Belgian Sidac would acknowledge the validity of our pat-

4359 ents and accept thereunder a license to operate under a specified quantity schedule by years. The consideration could be accompanied by delivery to us of 35% of the stock of Sylvania Industrial Corp. or its equivalent. Stock so offered could be in reparation of damages done in the past. This stock we could, of course, dispose of. The limited licenses under the patent could be construed as limiting future damage. It has developed since the conference that the principal patents, purchased at the time we acquired the rights in America, have expired. It was also suggested that under the circumstances we might feel it desirable to

give the Sylvania a limited license under our product patent for Moisture-proof Cellophane. This patent which we expect to get being a product patent, we would be in a position to specify the prices at which Moisture-proof Cellophane could be sold.

"In considering the developments which have produced this situation, it is well to consider the obligations of the French to us and of the obligations of the Belgian Sidac to the French. The Belgian Sidac has apparently acknowledged that they have pirated the French patents, processes, etc. The French have entered into an agreement with Du Pont under which they accorded us the exclusive rights to these processes and to this product in the American market. Now, the violator of these rights, both in Belgium and the United States is seeking settlement, so it would, therefore, seem that it was an obligation of the French to
4360 protect as far as possible those rights and licenses in the American market which they sold exclusively to us. While it is probably impossible and unwise to get the Sylvania Industrial Corp. out of the American market, it may be quite possible, in view of the controlling interest in Belgium, now a supplicant of the real owners of the patents and the licenses, that the latter would impose the necessary terms to protect not only its own interests in Europe, but to protect the interest of those to whom it sold exclusive rights and licenses in the United States.

"There are two reasons why we should not accept any compensation in any form from La Cellophane or from the Belgian Sidac for their pirating of the patents and processes which we bought for the United States.

"First, by so doing we acquiesce in La Cellophane coming into the American market, which by their contract they were obligated not to do.

"Second, we would always be in an unfavorable position in the American competitive market with regard to our own complete freedom of action by reason of the fact that we had received compensation, and this fact would undoubtedly have a bearing on all our future policies. In other words, any compensation which we obtained might be more than overcome by future handicaps.

"These two points should be borne in mind in considering any suggested solution."

4361 The Government offers in evidence Exhibit No. 1411, which is in relation to a Board meeting, captioned "S. I. D. A. C.—American Company Affiliation."

(Minute of Board meeting titled "S. I. D. A. C.—American Company Affiliation," dated 12/23/29, was received in evidence and marked "Government's Exhibit No. 1411.")

Mr. TURRIPP. It reads:

"The Board discussed at length the developments arising from the Belgian Sidac's approach to our French Associates in the matter of arriving at a settlement of their differences which arose from the former's pirating of the French patents and 'know how' through the erection of a plant for the manufacture of transparent sheeting in Belgium, with consequent damage to La Cellophane, and Sidac's promotion of an American Company (Sylvania Industrial Corporation) with consequent damage to DuPont Cellophane Company, caused by imports through the house of Birn & Wachenheim, pending completion of Sylvania's plant in Virginia which is expected to be in production early in 1930.

"La Cellophane has apparently not come to a final settlement with the Belgian Sidac pending an understanding with DuPont Cellophane Company as to how the latter's position in the U. S. can be protected, consistent with the contract for the formation of the DuPont Cellophane Company, under which La Cello-
4362 phane ceded to it all the rights and markets in North America. In view of the patent position in the United States, it was regarded as not being feasible to enter into a license agreement, as suggested in letter from Mr. Edmond Gillet to Mr. Henry L. Blum, dated December 5, 1929, under which the Belgian Sidac would acknowledge the validity of the United States Patents, and in turn have their American Subsidiary, make the same acknowledgment. The reason for this is that none of the existing United States Patents controlled by us are being followed in our own practice.

"From the information in hand, it appears that reparation to DuPont Cellophane Company should be made by the Belgian Sidac rather than by Sylvania Industrial Corporation, since the latter is merely the creature of the former. It was the unanimous feeling of the Board that the reparation should take the form of a cash settlement, rather than a settlement dependent upon the future welfare of either the Belgian Company or its American Subsidiary, because of the obvious possible complications, both technical and commercial. The Board appreciates the attitude of La Cellophane in protecting the position of DuPont Cellophane Company and hopes an arrangement can be evolved that will effect reparation to La Cellophane as well as to ourselves.

"It was, therefore, agreed that Vice-President B. M. May should hold himself in readiness to go abroad in response to
4363 cable from Vice-President F. W. Pickard of E. I. duPont de Nemours & Company, with whom he is to discuss the subject in collaboration with our French Associates for the purpose of negotiating a settlement in cash, free from any agreements, commercial or technical, direct or indirect, and under no circum-

stances agree to license Sylvania Industrial Corporation to operate under our recently granted Moisture Proof Cellophane Patents. It was the further feeling of the Board of Directors that any accord to which La Cellophane and the Belgian Sidac may arrive should be subject to the reservation that no technical information or patents emanating from DuPont Cellophane Company shall flow to the Belgian Sidac or any of its subsidiaries."

Mr. Gesell. Does your Honor's copy show the date? Mine did not print, but the date is 12-23-29.

The Court. Yes, sir, 12-23-29.

Mr. Gesell. They are the Board minutes of La Cellophane Company.

Mr. Turnbow. The Government offers in evidence Exhibit 1412, a letter from Edmond Gillet to Mr. Henry Blum dated December 5, 1929.

(Letter from Edmond Gillet to Mr. Henry Blum dated December 5th, 1929, was received in evidence and marked "Government's Exhibit No. 1412.")

Mr. Turnbow. It reads:

4361 "We have read with a great deal of interest the opinion of our friends on the plan of Entente between the Du Pont Cellophane and the American Sidac. We are now awaiting the visit of Mr. Pickard to talk it over with him.

"We are under the impression that we could make our Entente with the Belgian Sidac, but we do not want to make it if the American question is not settled and, despite all the fears of our friends, we think that a combination can be found to obtain the desired result without violating the American laws.

"We believe that when an industrial possesses, in the United States, a patent, he has incontestably the right to alone use this patent and, consequently, if the said patent concerns an industry, to have, to a certain degree, a monopoly of the said industry."—

The Court. Do you agree with that?

Mr. Turnbow. If it is a valid patent and the patent has not expired.

Mr. Gesell. I could almost move to dismiss on the basis of that concession, your Honor. That is what we had, a valid product patent that had not expired.

Mr. Turnbow. I can go further than that. I did not expect your Honor to ask me to write the textbook on the validity of patents and what you could do with them.

The Court. I didn't expect you to answer the question.

4365 Mr. Turnbow. Well, occasionally we make concessions, your Honor.

Continuing: "We do not think that an industrial has ever been assailed who, having an infringer competitor, stops the infringer,

thanks to the value of his patents, and in this manner, assures himself of a kind of company based upon the value of his patent.

"If this thesis is correct, why not consider that the American Du Pont Cellophane possesses all the patents permitting the manufacture of this product, the validity of the said patents having been acknowledged by the Belgian group who has sold its process in the United States.

"Under those conditions, why would not the American Cellophane who possesses these patents, grant a license, upon terms to be determined, to the American Sidac if the latter concern promises, in the license contract which it will accept, to limit its production to a certain number of machines and pays a royalty on the Cellophane produced, royalty which could be paid either in kind depending upon the quantities produced, or through a participation in the profits of the business, this participation in the profits to be eventually transformed into common stock of the concern.

"I am therefore asking you, by dear Henry, to talk over with Paskus, the formula to be found in order to arrive at an En-
4366 tente which we made as a condition to the directors of Sidac.

"We are convinced that the latter are very desirous of making it.

"They are desirous of making it, to such an extent, that they are disposed to cable to Mr. Wallack to come to Paris during the sojourn of Mr. Pickard.

"We naturally do not want to accept this proposition without being certain that Mr. Pickard will accept to talk over with Mr. Wallack the question of an Entente, and, if this Entente is based on the acknowledgment of the validity of a patent and on the granting of a license, we do not see how it could be subject to criticism or even dangerous, considering your laws governing Entente.

"When, after having received this letter, you will have finished the inquiry I am asking you to make, you will only have to cable me and, if necessary, I will telephone to you in order that you may be able to give me Mr. Paskus's opinion and that our friends the Du Ponts."

The Government offers in evidence Exhibit 1413 from Mr. Carpenter to Mr. Yerkes dated January 20, 1930.

(Letter from Mr. Carpenter to Mr. Yerkes dated January 20, 1930, was received in evidence and marked "Government's Exhibit No. 1413.")

Mr. TURRENTY. It reads:

"Several days ago I discussed the proposed Cello-
4367 phane settlement with Mr. Mudge inquiring of him specifically whether it would be possible for du Pont or Du

Pont Cellophane to hold an interest, say a 20% interest, in the Sylvania Company in case we should make a settlement with the Belgians along the lines outlined in your recent memorandum.

"I understand your objections to retaining a part interest in the Sylvania Company, which I think are good reasons. On the other hand, it occurred to me that possibly it might not be as profitable to release this interest just at the time we make the settlement as it might be at a later time either because of the general market conditions or because of the as yet unproved earning capacity of the Sylvania Company.

"I am attaching a memorandum which Mr. Mudge sent to me which you might be interested in looking over though I do not know, at the moment, that there is any action necessary on our part at this time in this connection."

The memorandum attached reads:

"As a result of negotiations between E. I. duPont de Nemours & Company and La Cellophane, consideration is being given to the acquisition by said La Cellophane from a Belgian cellophane company of 40% interest in the Sylvania Company, producing rayon * * *" and there is a question mark in the margin "* * * in the State of Virginia, which stock is owned by the Belgian Company, and the transfer to DuPont Company of one-half of such interest by La Cellophane. Opinion has been
4368 requested as to whether the acquisition and retention by DuPont Company of such 20% interest in the Sylvania Company would constitute a violation of our anti-trust laws.

"In 1921 when DuPont Company organized the DuPont Cellophane Company, it acquired from La Cellophane exclusive rights in the United States to the use of certain patented and secret processes owned by La Cellophane for the production of cellophane, the minority interest in DuPont Cellophane Company being transferred to La Cellophane in consideration therefor. Subsequent thereto, the Belgian company, above referred to, secured the services of one of La Cellophane's employees who was familiar with such secret processes, and commenced the production and sale, throughout Europe and the United States, of a product made therefrom. A substantial business in such Belgian cellophane has been built up in this country and has recently been taken over by the Sylvania Company, which has begun production and sale in the United States. After protracted litigation between the Belgian Company and La Cellophane, the Belgian company has expressed its willingness to make reparations for the injury and damage to the French company and its assignee, DuPont Company, because of the unauthorized use of such processes, and it has been suggested that such reparations take the form of transfer of the Belgian company's interest in the Sylvania Com-

party to the French company, and by the French company
4369 of a portion thereof to DuPont Company.

"The acquisition by one corporation of a whole or any part of the stock of another competitive corporation is in violation of our anti-trust laws only when the purpose or effect of such acquisition is to substantially lessen competition between them or it tends to create a monopoly. The law is not intended to cover a mere investment by one corporation in the stock of a competitive corporation. Where the stockholding of DuPont Company in the Sylvania Company is limited to investment only (and this will be best evidenced by no exercise, for the time being, at least, of DuPont Company's voting rights therein), such stockholdings having been acquired in the manner above indicated, it is believed that neither such acquisition nor the retention by Du Pont Company of such stock will constitute a violation of our anti-trust laws."

Attached is a statement of the Clayton Anti-Trust Act which the Government will not read.

The next exhibit is 1414, which has already been offered in evidence, sir. In that connection, the names of the gentlemen on that list, No. 1414, I would like to call to your Honor's attention that Van Ham is Sidac.

Vleurink—I have not been able to find his name mentioned any place else.

Pickard is duPont, Swint is duPont.

4370 Mr. GESELL. Wait a minute. You don't find Pickard's name signed to that document.

Mr. TUBRIDY. I didn't say it was.

Mr. GESELL. You talked a moment ago about the signatures.

Mr. TUBRIDY. I beg your pardon.

The COURT. Let us get along.

Mr. TUBRIDY. I don't like to be accused of things I haven't said.

The COURT. That is all right. I am following you.

Mr. TUBRIDY. I said the names appearing on the document were, Van Ham, Sidac; Pickard, duPont; Swint, duPont; Lessmann, Kaile; Todt, Kalle; Brandenberger, Comptoir; Gillet, Comptoir; Bernheim, Comptoir.

The Government offers——

The COURT. What about that last name? I didn't get that last name.

Mr. TUBRIDY. Maucomble?

The COURT. Yes.

Mr. TUBRIDY. I don't know, sir.

4371 The Government offers in evidence Exhibit 1415, which is a letter from Mr. Pickard to Mr. Yerkes dated January 29, 1930.

(Letter from Mr. Pickard to Mr. Yerkes dated January 29th, 1930, was received in evidence and marked "Government's Exhibit No. 1115.")

Mr. TUBRIDY. It reads:

"I have to-day sent the attached cable to London to be ceded and forwarded to you.

"Messrs. Gillet and Bernheim have not received copy of your memorandum and read my copy with obvious interest. They stated that their negotiations with Sidac were continuing, but always with a diminishing amount of compensation, and that they would not receive anything like the 35% which they talked of originally. In a similar way the possibilities as to compensation for America have shrunk. This last fact makes Mr. Carpenter's plan inoperative, as any stock of the American company secured for compensation would be only a small amount.

"Your alternative plan met with no favor, as they felt it was giving up one of their largest assets without proper compensation, and at the same time opening the world to general competition.

"Foreseeing these objections I had hastily prepared a memorandum, the original of which I am enclosing; I did not show
4372 them this on our first interview, preferring to wait until to-day when we had another talk, and I found them, particularly Mr. Gillet, quite receptive to the general plan suggested, but, of course, without accepting the proportions of interest indicated therein, and also raising the point of necessary participation by Sidac and Wolff.

"I explained, of course, that I was making this suggestion without consultation with anyone and with no idea of presenting a detailed plan, but that it would eliminate destructive competition, operate at the lowest possible selling expense and allow of logical shipments from the standpoint of both types of goods, freight and other charges.

"Such a company would have nothing to do with the business of the United States and, in my opinion, in Canada also, the situation there being left entirely to us.

"Mr. Gillet proposes to talk within a week or so with the Belgians and also, if possible, with the Germans, so that I may have some further reaction from him before I leave London on February 12th.

"You may not be aware that the territory given Calle & Company for cellophane includes Russia, Australia, Poland, the Balkan States and China. The inclusion of China was a great surprise to me.

"Mr. Swint was present and is thoroughly in touch with the situation."

4373 The Government offers in evidence Exhibit 1416, letter from Mr. Yerkes which is stated to be "Telephone Conversation Between L. A. Yerkes, in New York, and F. W. Pickard, In The London Office," dated February 5, 1930.

(Memorandum from Mr. Yerkes entitled "Telephone Conversation Between L. A. Yerkes, In New York, and F. W. Pickard, In the London Office," dated February 5, 1930, was received in evidence and marked "Government's Exhibit No. 1416.")

Mr. TURRENTY. It reads:

"The question of our exporting rayon to Germany interferes, in Mr. Pickard's opinion, with the foreign relations with the I. G. (not Glanzstoff). The I. G. and du Pont have an understanding which prevents one or the other from shipping directly into each other's territory; and Mr. Pickard feels certain that if we shipped rayon into Germany they would object and would retaliate not only with rayon but with many other products, etc. etc."

We will skip the next two paragraphs and continue with the following:

"The Cellophane situation is as follows:

"The French absolutely refuse both suggestions made in our memorandum of January 14th, and make the alternative suggestion of a general exporting company to be formed by the French, Kalle, Sidac and ourselves, in which we would probably obtain from 20% to 25% interest in addition to 100% rights in America, our dependencies and Canada. Pickard is very

4374 favorable to this suggestion.

"The French are not going to obtain the 30% to 35% interest in Sidac which was originally contemplated but will obtain, according to Pickard, not more than 15%. This 15% will be taken from the Sidac Company itself as well as from individual stockholders in Sidac. The Sidac Company have 40% of Wallach's company in America, so that the French on this basis would obtain a 6% interest in the American Sylvania Company through the Sidac.

"Mr. Pickard is quite clear that we cannot obtain cash compensation nor can we obtain freedom in the world selling markets, in view of the greatly reduced amount of compensation which the French are going to obtain from Sidac.

"Mr. Pickard thinks that the negotiations with the Germans with regard to the A. K. U. and the negotiations with the French with regard to the Cellophane-Sidac situation are both very important and that they should be continued promptly and not allowed to drag along, and he would like Mr. Lammot du Pont's opinion and instructions immediately as to whether he should return on the 19th as planned or whether he should stay over and await the arrival of either Ben May or myself to continue the

conversations on one or both of the above subjects. He was quite clear that in his opinion the negotiations should be carried on as promptly as possible, although he indicated at the same time that he wanted to come home.

4375 As I get it, if the negotiations on both of these subjects are continued in a favorable light at all, between now and the 19th, Pickard should remain and Ben May should hold himself in readiness to go over immediately. Pickard wants a cable with instructions on or before Saturday of this week, and has asked me to request Mr. Lammot du Pont to cable him at the London Office.

"L. A. YERKES"

Postscript: "After further consideration of this matter, and in view of the fact that after I suggested to Pickard that he come home and we discuss the matter further and then return to Europe, and he did not agree to this, it seems to me advisable that May should go as quickly as possible and that Pickard should be asked to remain and await his arrival.

"I am doubtful if the negotiations with regard to our participation in the European A. K. U. or the American companies will lead to anything definite, but it looks as if the Cellophane-Sidac matter could probably be settled if we are willing to accept a 25% participation in a general Cellophane exporting company in return for allowing the French to participate in the Belgium Sidac and consequently in the American Sylvania.

"The alternative position seems to be that we do not ac-
4376 cept this proposal of the French, in which case they would do one of two things—first, refuse to participate in the Sidac Company; second, take their 15% participation in the Sidac Company.

"If they do the first, the situation would remain exactly as it is now. If they do the second, they would be breaking their contract with us and consequently we could, if we so desired, break the contract ourselves; that is, sell anywhere in the world that we saw fit. This suggestion is Ben May's and I think has some merit.

"I am in favor of asking Pickard to remain abroad and await Ben's arrival. In the meantime we should have to hold a meeting to decide the position Ben was to take in both the A. K. U. and Cellophane matters on his arrival in Lond.

4377 The Government offers in evidence the next document which is offered as No. 348.

The COURT. Yes.

Mr. TURRIPY. It is 1417 originally, but that has been stricken out and it is offered as 348. This is a letter from Mr. May to Mr. Jenney, dated April 18, 1930.

The COURT. When you say that, has it in fact already been introduced?

Mr. TURRIDY. No, sir, but our numbering scheme is such that it would be confusing if it came in as 1447 when 348 comes up later. Do I make myself clear, sir?

The COURT. No.

Mr. TURRIDY. I offer it in evidence as document 348.

The COURT. Fine.

(The letter from Mr. May to Mr. Jenney, dated April 18, 1930 was received in evidence and marked "Government Exhibit No. 348:")

Mr. TURRIDY. This reads:

"In reference to your memorandum of April 15th on the 'Cellophane' situation, I will answer your question regarding what is the capacity of our machines by stating that we regard the net production per machine to be 65,000 pounds per months, after taking up all cutting losses which are involved in the
4378 trimming of the original sheets as well as the loss involved in cutting sheets to special size. You will understand that a large part of our business is what you might call a customs business, that is, we must cut sheets to the particular sizes which our customers request and we also have a large output in the form of special size rolls and the percentage of waste in all of these particular orders varies to some extent. What we call 300 weight 'Cellophane', which corresponds to what they refer to as 20 grams, runs 22,000 square inches to the pound or 14.2 square meters to the pound.

"La Cellophane told us that in 1929 they produced 51% more than in 1928, but actually sold 68% more in 1929 than they sold in 1928 and I found after my visit to England that a great deal of the 'Cellophane' which was sold by the French company in England was supplied to them by Kalle & Co., which explains why the sales made showed such a marked increase over the figure given for the increase in production.

"La Cellophane's London office told me up until this spring price lists meant very little in England, because of the severe competition which was being given the French company by the Belgians in that market. They said that the average selling price obtained in England was equivalent to 63¢ per pound (U. S. money) for 1929 and that a good average price for 300 gauge was 3¢ per thousand square inches, altho they had sold important customers as low as 2.68¢ per thousand square inches on account of the competition.

4379 "Since the French and Belgians have come to an accord, they have elevated the price in England, effective March 15th, to 3.396¢ per thousand square inches, which you will note is an advance of approximately 30%.

"To give some idea of the effect that the Belgian competition had on their prices in England, I was told that in 1927 the average price was $1.50 a pound, receding in 1928 to 75¢ and in 1929 to 63¢. The present prices are equivalent to about 86¢ per pound."

* * * * * * *

4380 The Government offers in evidence Exhibit 1419, a letter from Mr. May to Mr. Ewing, dated August 15, 1930.

(The letter from Mr. May to Mr. Ewing, dated August 15, 1930, was received in evidence and marked "Government Exhibit No. 1419.")

Mr. Tramm reads:

"Messrs. Pickard and Swint were here yesterday and we discussed a number of the questions you wrote us both about in your letter of July 23rd.

"The question of export arrangements with the Cellophane groups in Europe seems to drag along without any conclusive results. We can simply hope that in time we shall be able to receive, either from you or from Mr. Bernheim, something definite.

"One of our former employees, who has just returned
4381 from a trip to Japan, has told us about the Tokyo Cellophane Paper Company, Ltd., who are manufacturing a transparent product and selling it under the name of Cellophane in Japan. We have written to Mr. Bernheim about this, asking him if he can give us any details, and are also communicating with the duPont Company's Kobe office to see if they can develop further information for us. In view of this development, we would not be willing to discuss the proposition of our abandoning the South American market for rights in Japan.

"As regards South America, we have about concluded that the thing for us do to is to adopt a new name for Cellophane in South America and to have it trade-marked there, and to proceed immediately to exploit our opportunities in those countries. We would be very averse to selling our product and La Cellophane through a common agent. There would be many practical difficulties connected with such an arrangement, and would undoubtedly lead to one of the parties getting less favored treatment, for the simple reason that our products are not identical, and the one which was found to be preferred would naturally be the one that a common agent would most aggressively promote.

"We are all very much at a disadvantage in discussing the question of Cellophane moving pictures and projecting machines until we receive from Mr. Bernheim one of his new projecting
4382 machines, together with several complete Cellophane films to project from it. Please, therefore, continue to remind

him of the importance of sending these things to us as you may see him from time to time.

"We had rather had an impression right along that the water-proofing treatment which they are using for moving picture film differs from the process and the formula which we use in producing Moisture-proof Cellophane. There is nothing particularly surprising about this, since the objectives of moisture-proofing Cellophane for wrapping purposes are quite different from the objective they have in water-proofing Cellophane film for a projecting machine.

"We are very watchful of any possible infringements of our Moisture-proof patents. All samples of the moisture-proof material that we have been able to procure, and which were produced in Europe, were so far from being moisture-proof when gauged by our standards that we have not felt so far that they represent the kind of infringement we wish to attack. Please, however, do not construe this as meaning that we are taking lightly any of these developments and that we are not watching very closely anything which would require vigorous action on our part."

The Government will not read the last paragraph.

The Government offers in evidence Exhibit 1420, dated September 12, 1930, from Mr. Ewing to Mr. May.

4383 (The letter from Mr. Ewing to Mr. May dated September 12, 1930, was received in evidence and marked "Government Exhibit No. 1420.")

Mr. TUBRIDY. It reads:

"On a recent trip to Paris, I conferred with Mr. Bernheim and Mr. Gillet at two different times and especially spoke to Mr. Bernheim regarding the questions raised in your letter of August 15th. Regarding the question of export arrangements with the cellophane groups in Europe, Mr. Bernheim regrets that these negotiations are dragging, and because of the complexity of the temperaments of the different participants, the reaching of an agreement at an early date seems improbably. Wolff & Co., Kalle & Co. and the Comptoir are to a large degree in agreement, but Sidac complains that Wolff is still selling cellophane in Italy in competition with the Sidac Italian company, and on the other hand Wolff will not withdraw from Italy until final agreement is reached.

"This seems to be the point which is hanging the agreement at the present time, which is also borne out by the information obtained from Mr. Beneghr of Walsrode last Tuesday. Mr. Bernheim has written to Sidac trying to overcome the difficulties on this one point, but has yet received no reply. Progress is being made,

therefore, but until Sidac changes their attitude of trying to improve what is regarded as their weak position, it seems that no conclusion will be reached.

4384 "Mr. Bernheim showed me a cable from Mr. Henry Blum to the Comptoir on the Tokyo Cellophane Paper Co. Ltd. The Comptoir are now investigating the Japanese patent position and will advise us upon completion of their study.

"I also asked Mr. Bernheim if he would be in a position to deliver to you at the promised date the projection machines for cellophane moving pictures. He is quite upset that delivery of the first machines on order will be delayed until the end of October. He fully appreciates that we cannot continue our study of the motion picture development until you receive a projection machine, and he is planning to make delivery of the first one to you. You may look forward, therefore, to receiving it sometime during November, unless the machine company again defers delivery date."

The Government won't read the last paragraph.

Exhibit 1421 is already in evidence as Exhibit No. 1254.

The next document is already in evidence as Exhibit 1111, which is numbered 1422 in this book.

The next document is in evidence as Government Exhibit 1112, which is numbered 1423 in this book.

The next exhibit is already in evidence and is Exhibit 1022. It is No. 1424 in this book. If your Honor will recall, that document sets out the allocation of territories to the various countries,

4385 and it was in connection with that document that Mr. Gesell handed you a map.

The COURT. Correct.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1425, captioned "Cross Reference Sheet."

(The paper entitled "Cross Reference Sheet," and attachments were received in evidence and marked "Government Exhibit No. 1425.")

Mr. TUBRIDY. It reads:

"Name or Subject: Report prepared by P. H. Chase, forwarded to us by J. K. Jenney, regarding a conversation between F. W. Pickard and officials of the Comptoir on October 11, 1932."

Attached is a letter from Mr. Jenney to Mr. Yerkes dated October 24, 1932, which states——

The COURT. I think we will postpone the reading of that until next week.

Mr. TUBRIDY. Very well, sir.

The COURT. I suggest that we meet in the court library next Wednesday morning when we resume, say, at 10:00 a. m., and we will discuss future dates between now and the summer recess. Will you please have that in mind?

Mr. TUBRIDY. 10:00 a. m., sir?

The COURT. Yes.

Adjourn court.

(At this point the trial was adjourned until Wednesday, February 7, 1951, at 10:30 o'clock a. m.)

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4402 *2nd trial memorandum*

Sur Restricted Use of Documentary Evidence Adduced by Plaintiff

LEAHY, Chief Judge.

In the course of the trial several occasions have arisen where the Government objected and attempted to foreclose defendant from commenting on portions of writings offered in evidence by the Government. The Government contends defendant has no right either to read into the record portions of these documents or to attempt to interpret orally by comment the matters therein contained. Defendant contends it has the right to make such comment as it sees fit, especially where the matters contained in the writings appear to be adverse to the Government's contentions. When the question first arose, I overruled the Government's objections and stated I would continue to so rule pending the filing of memoranda authorities by counsel.

1. The Government states F. R. 26 (d) (4) provides that in the case where a deposition is offered, an adverse party may require
4403 the introduction of all, not a part, of the document, but the adverse party can only insist that all means all that is relevant to the part introduced; and that F. R. 43 (b) follows the same procedural pattern with its provision that a live witness may be cross-examined by the adverse party only upon the subject matter of his examination-in-chief.[1] So far, our trial has

[1] The most recent discussion is found in Bell v. United States, 4 Cir., 185 F. 2d 303, 310-311:

"Questions of this kind must necessarily be left largely to the wise discretion of the trial judge especially in a case involving many factual details, that may be easily confused or obscured in the minds of the jury. Of course, it is the duty of the judge in a criminal case to allow full and free examination of the government's witnesses in order that all relevant facts may be disclosed; but in the federal courts for over a hundred years the rule has been that the scope of cross examination is limited to subject matter referred to during the examination in chief; and if a party wishes to examine a witness regarding other matters, he must do so by making the witness his own and calling him as such in the subsequent progress of the trial. Philadelphia & Trenton R. R. Co. v. Stimpson, 14 Pet. 448, 461, 39 U. S. 448, 461, 10 L. Ed. 535; Moyer v. Aetna Life Ins. Co., 3 Cir., 126 F. 2d 141, 143; Kincade v. Mikles, 8 Cir., 144 F. 2d 784, 787; Wigmore on Evidence, (3d Ed.), §§ 1885-1888. See Hider v. Gelbach, 4 Cir., 135 F. 2d 693, 695. This rule has been the subject of some attack and an attempt was made by Advisory Committee when formulating the Rules of Civil Procedure in 1936 and 1937 to change the rule to allow cross examination upon all the material and pertinent issues of the action. The Supreme Court in rejecting these proposals and in adopting Rule 43 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. Rule 43 (b), as it now stands, indicate that 'the historic limitation upon the scope of cross examination to the subject matter of the direct examination is still to be enforced in the federal courts.' Moyer v. Aetna Life Ins. Co., 3 Cir., 126 F. 2d 141, 143; Wigmore on Evidence (3d Ed.) § 1888. Nothing to the contrary appears in the Federal Rules of Civil Procedure."

only been concerned with documentary evidence, which, it is true, constitutes testimonial evidence, but the Government argues, evidentiary rules concerning exclusion of oral testi-
4404 mony are applicable because the nature of many of the documents which have been and will be offered by the Government render them analogous to hostile witnesses; and, as these writings have been obtained from the files of defendant, on the Government's theory, they constitute admissions. Since the writings contain self-serving declarations, the Government contends they represent testimony hostile to its proof.

The Government claims no absolute exclusion of the documentary evidence which it introduces upon which it does not rely, but concedes that any portion of the documents which defendant wishes to utilize may be introduced by defendant in the course of its own defense. The Government's objection, then, is directed solely to engrafting upon its case-in-chief what it denominates as self-serving declarations which are utterely unrelated to the subject matter for which the particular Government's exhibit is introduced. In short, the Government argues the proponent of a document offered at trial is not under compulsion to rely upon
4405 every statement contained therein,[2] particularly when the writing is of the nature of those found in the case at bar.

Wigmore[3] suggests the decision as to whether the whole of a document must be considered when it is put into evidence is one of no real consequence and the application of the rule becomes a mere quibble or skirmish for a tactical position. He refers to the lack of harmony and definiteness in the decisions on the
4406 question. Procedural protocol should never, I think, be utilized to prevent a judge from probing into all facts. All facts do not mean all master facts, persuasive or controlling facts which swing a decision; but I am of the belief it is helpful to me, at least, to become familiar with all facts which have any bearing whatsoever on the legal problem called for solution.

2. In the case at bar the documents in question have been offered in their entirety by the Government and they have been so

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[2] In United States v. Monjar, D. C. Del., (unreported, August 12, 1946), I had this to say:

"It is established, in this Circuit, at least, that the government has a duty to present evidence which makes for the defense. In exchange for this duty the government is benefited by the rule that it is not bound by the testimony of its own witnesses. In other words, the jury may reject all of the government witnesses' testimony which is favorable to the defendant and accept only that which is to the defendant's detriment. This was precisely the situation in United States v. Reginelli, 3 Cir., 133 F. 2d 595, and United States v. Palese, 3 Cir., 133 F. 2d 600."

For the duty of the Government to bring forth facts both for and against defendant, see the statement of Judge Maris in United States v. Palese, supra:

"In such a case the Government does not necessarily give credence to a witness merely by introducing him, for it is the duty of the [Government] in a criminal case to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused."

[3] On Evidence, § 2102.

received in evidence. But now that the question for decision has been posed, the dominant motif stressed by the Government is relevancy. Defendant has crossed swords on this proposition by stating that the lack of price collusion, for example, with Sylvania and the motivation of defendant's price policy are relevant to the issues raised by Paragraphs 22, 23, 35 and 42 of the Complaint and, for further particularization, defendant points to the documents tending to show the absence of market domination which, it claims, are relevant to issues raised by Paragraphs 11, 22, 30 and 44. In this connection, it is defendant's position it facilitates consideration of the evidence and avoids unnecessary repetition to develop the pertinence of any particular document to all phases of the case at the time the document is received in evidence;[4]
4407 and, moreover, full comment by both parties should be had during the course of the trial and at the time a document is first offered because this, in the instant case, was clearly within the contemplation of the parties during pretrial considerations.[5] In support of its argument, defendant contends the trial judge has discretion to permit discussion of a document or a series of documents at the time they are offered with respect to any issue to which the document is said to be relevant, as much unnecessary cross-referencing and back-tracking will be avoided if the Court continues to permit discussion of documents in evidence with respect to all issues in the case to which each party thinks they are relevant. Defendant contends at the close of the Government's case, defendant in support of its motion to dismiss should be entitled to refer to any evidence which has been submitted and the Court's understanding and grasp of the evidence with relation to all documentary proof as it comes in will be furthered by full discussion of the documents or series of documents as they
4408 are offered; and that this procedure, rather than the postponement of reference to all documentary evidence by defendant until all plaintiff's evidence is in the record, is preferable. Both the Government[6] and defendant[7] have in trial memoranda referred to various authorities, which I have respectfully read and considered. I conclude these do not control the question that has been put in this case.

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[4] Wigmore, Ibid., §2094.

[5] Pretrial Order of October 11, 1949:

In connection with the submission of any documentary evidence, both parties shall be afforded the opportunity to discuss orally with the Court the contents of such documents, indicating the portion relied upon, and presenting views as to the significance and interpretation of the documentary proof thus adduced."

[6] Tappan v. Beardsley, 77 U. S. 427, 435; Southern Pacific Co. v. Stephany, 9 Cir., 255 F. 679.

[7] Davis v. Cobiens, 174 U. S. 719, 727; Wills v. Russell, 100 U. S. 621; United States v. Minuse, 2 Cir., 142 F. 2d 388, 389; Hyland v. Millers National Insurance Co., 58 F. 2d 1003, 1010, aff'd 9 Cir., 91 F. 2d 735, cert. den. 303 U. S. 645; Wigmore, Ibid. §§ 1872, 1884-9.

3. Nisi prius judges as well as the trial lawyers in antitrust cases have recently suggested that the trial of such causes do not always fall into orthodox procedural patterns, due to the economic complexity and the nature of the proof which must be adduced
4409 and considered.[8] The question, I think, is really how you as trial judge want to handle the particular case—the balance of (1) becoming bogged in a confusion of the issues of a plaintiff's case by allowing everything in the entire document, after it is introduced, to be discussed even though the part defendant wants to consider is not germane to the portion of the document for which the Government, say, is using it; or (2) the problem of determining the question of relevancy on each portion of the evidence where the Government urges only a particular portion for a certain point.

I think defendant here should have the right to the procedural conduct it has so far taken because I, as trier of the facts, can sift the entirety of any document and pick out the part upon which the Government relies, disregarding irrelevant portions. There is no problem in this case of having either party damaged from the fact that a jury might put undue emphasis upon certain evidence which has been presented and which may or may not be of advantage to defendant. A trial judge should be a skillful fact-finder and never pause in his work for fear of an erroneous ruling on the allowance of discussion of admitted evidence because he well knows that if error has been committed he, himself,
4410 may cure such error by either striking out or totally disregarding inadmissible evidence in the deliberation of his case.[9]

4. My conclusion is at the time a piece of documentary proof is received in evidence, the Court, in the exercise of a sound judicial discretion, can and should permit both parties then to comment fully on any portion of the writing which each party thinks relevant to the issues which it contends are before the Court.[10]

Dated: FEBRUARY 6, 1951,
Wilmington.

4411 *Offers in evidence*

Mr. GESELL. Before Mr. Tubridy goes on, your Honor, perhaps I could comment briefly on this issue that was presented.

The COURT. Yes. This has to do with the matters that arose on Friday, as I understand.

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[8] McAllister, "The Big Case: Procedural Problems in Antitrust Litigation", 64 Harv. L. Rev. 27; Whitney, "The Trial of an Antitrust Case", The Record (Association of the Bar of the City of New York), Vol. 5, p. 449; Handler, "Anti-Trust—New Frontiers and New Perplexities", The Record, Ibid., Vol. 6, pp. 59, 80-1-2.

[9] Wigmore, Ibid., § 19; Oates v. United States, 4 Cir., 233 F. 201, 204-5.

[10] A 3rd Trial Memorandum of Decision on the scope of the issues as argued by counsel on February 2 will, it is expected, be forthcoming shortly.

Mr. TUBRIDY. Yes, sir, before we took up this new section.

Mr. GESELL. I repeat to your Honor the statement I made that there is no evidence in the plaintiff's case that the group of some 15 or 20 agency arrangements which were listed in those little, short documents were cancelled. Some of them were. There is no proof as to how many of them, that they were cancelled.

The COURT. Two or three is my recollection.

Mr. GESELL. Two or three were, maybe as many as four. I have not counted them up. But I think in all there is a group of maybe 15 or 20 of them that appear in the exhibits, and I rose simple to say that there was no proof of the cancellation of those arrangements.

Now, with respect to these schedules which are excerpts of the earlier document, I simply ask your Honor to refer back to my comments at the time the basic exhibits from which these excerpts were taken, because those comments will show a much larger group of countries than was listed here which were countries
4412 within territories where duPont would have been excluded had the agreements continued in effect. This is a selected group. There are others that were covered by the agreements I mentioned, many of them at the time we discussed that basic document. The fact that there was a cessation of sales in some cases in 1945 and they did not pick up again until 1947 or did not pick up at all is, of course, attritutable not to cancellation of agency agreements, as the Government seems to desire to have the Court infer, but is attributable to the evidence that we have had in the record of the short supply situation that existed, and there is no indication that our failure to sell after 1945 in some of those markets resulted from anything but economic circumstances. You will note in this last exhibit, 368, Mr. Haley is saying that we want to stay in these export markets. He said we should revise our price situation, but there is no indication there in that document of a withdrawal from the export markets, and there was not. Some of the countries that were omitted from this list of schedules that were in the other territories would include countries like Belgium, Bermuda, and Finland, and other that I mentioned on the earlier discussion.

The COURT. You say I will find this list of countries in 399?

Mr. GESELL. At 399, your Honor. I ran down the list at the time we went over the main exhibit.

The COURT. Yes, I remember.

My notes indicate, Mr. Tubridy, that we stopped with
4413 Exhibit 1425 on Friday afternoon.

Mr. TUBRIDY. Yes, sir. I believe it was offered in evidence, but the attached letter was not read.

The COURT. That is correct.

Mr. TUBRIDY. We are starting with the attached letter to Exhibit 1425. We will now read the attached letter dated October 11, 1932, which is a letter to Mr. Chase.

The COURT. Could you help me, Mr. Tubridy, by identifying Mr. Chase?

Mr. TUBRIDY. He is from the British office, I believe, sir.

Mr. GESELL. I thought he was with the Pairs office.

The COURT. For whom does he work?

Mr. GESELL. He is an employee of duPont abroad.

The COURT. All right.

Mr. TUBRIDY. (Reading.) "On Tuesday morning, October 11th, a meeting took place at the Paris Office of the Comptoir des Textiles Artificiels between Mr. F. W. Pickard, accompanied by Mr. Ewing and Mr. Chase, and Messrs. Charles Gillet and Rene Bernheim. Mr. Carnot, of the board of the Comptoir des Textiles Artificiels, was also present part of the time."

I shall not read the next paragraph, sir.

"On the other hand, however, the export market of the Comptoir des Textiles Artificiels has suffered considerable
4414 due to the Japanese competition. The Japanese manufacturers are now selling everywhere at prices which are sometimes below the production cost of the Comptoir. The markets which were well in the hands of the Comptoir, like Syria for instance, are therefore becoming much less profitable."

Mr. GESELL. That is rayon you are talking about. The paragraph you skipped shows that is rayon, not cellophane.

Mr. TUBRIDY. Yes.

"It was mentioned incidentally by Mr. Bernheim, at a time when the talk was on the cost of patent suits, that the patent suit started by Courtauld's against the Comptoir and applying to the manufacture of Celta had never been settled by a court decision. The proceedings have shown without any doubt that the Comptoir should win, but Justice Eve has delayed for a very long time rendering his decision."

Mr. GESELL. This is still rayon, your Honor.

Mr. TUBRIDY. Is there any question as to relevancy, Mr. Gesell?

Mr. GESELL. Sure, it is entirely irrelevant so far as rayon is concerned.

Mr. TUBRIDY. When I finish it I will show the relevancy of it, your Honor.

"The proceedings have shown without any doubt that the Comptoir should win, but Justice Eve has delayed for a very long
4415 time rendering his decision. It was hinted by Mr. Bernheim that he was friendly to Courtauld's, which would explain his attitude. On the other hand, Mr. Bernheim is of the opinion that appealing to a higher court to oblige Justice Eve

to pass judgment, would only result in antagonizing him. The rendering of a judgment would only have the advantage for the Comptoir of being reimbursed for their expenses connected with the suit. The proceedings have shown so clearly that the Comptoir was in the right that they do not foresee any further attacks regarding those patents. The Comptoir, by the way, have spent about 38,000 pounds—in connection with the suit, while Courtauld's expenses have been about 50,000 pounds.

"The American Viscose Company having been mentioned, the names of Mr. Salvage and Mr. Johnson were brought up. Mr. Bernheim stated, in that connection, that Mr. Johnson was a self-made man but with a very forceful personality and extremely able besides being a very hard worker. He considers him as the most important person in the Courtauld's organization and is of the opinion that no measure will be adopted by Courtauld's if Mr. Johnson is opposed to it. He cited instances that had come up in the past in which the Comptoir and Courtauld's were in entire agreement, but although the measures proposed had been approved by some of the most important men in Courtauld's, they could not be carried out because Mr. Johnson opposed them. Mr. Bernheim expressed the opinion that Johnson was the only man in the
4416 Courtauld's organization who could hold up against Mr. Salvage of the American Viscose Company, but left no doubt as to his opinion that in case of conflict Johnson would have the upper hand.

"Regarding Cellophane, Mr. Bernheim advised that the relations of the Comptoir with Sidac had not improved since the last report that had been given, but were on the contrary getting worse. They are going to start a suit against Sidac in order to obtain payment of the amounts due to them by that concern. Mr. Bernheim once more expressed the dissatisfaction of the Comptoir's officials with the attitude of Sidac who continue to be most unreliable people, never holding either to the spirit nor even to the letter of their engagements.

"Mr. Pickard advised that the patent suit against the Sylvania Corporation would be started very shortly.

"The Transparit Paper Company was mentioned and it was explained by Mr. Ewing how we had come to refer those people to the Comptoir since they were a British concern. While negotiations at the present time are at a standstill, Mr. Bernheim indicated that it was not very likely that they would succeed, Mr. Malcolm's representative having exaggerated ideas as to the price to be asked, which was not at all in relation with the value of the assets.

"Regarding Japan, Mr. Bernheim and Mr. Gillet thought that, should the du Pont Company make a deal with a Japanese

concern regarding the manufacture of Cellophane by
4417 Japanese interests in that country, this might prove very dangerous regarding the sale of that product in all the Far East territory and even in other parts of the world. The Japanese would probably follow the same methods which they have used already regarding Rayon and Celluloid. Mr. Pickard agreed with this and said that, although we had been approached already by such concerns as Mitsui and Mitsubishi, we have no desire for the present of coming to an agreement with them and will delay the negotiations as long as possible. If, however, we come to the point when we realize that those people are going to have anyway a Cellophane plant, we might just as well be the people to make the deal with them and get the financial compensation resulting from the building of such a plant.

"Regarding the manufacture of Cellophane in England, it was stated by Mr. Bernheim that do decision could be taken for the present time, as long as the Sidac situation remains uncertain as it is. No plan can, therefore, be made at present.

"Regarding the coating of Cellophane in England, some operations have been taking place on a small scale so as to uphold the validity of the patent. Regarding the carrying on of that operation on an industrial scale, no decision has yet been taken as to this will depend partly on the British customs duties that Cellophane has to pay when entering England. Coating of Cellophane on an industrial scale means the erection at high cost
4418 of a special tower, and the Comptoir are not going into such an expensive proposition before knowing exactly how they stand in determining their best policy."

With regard to that patent suit between Comptoir and Courtauld's, I would like to point out to your Honor that the British Cellophane Company was organized 50% by La Cellophane and 50% stock by Courtaulds and found it was better to cooperate than it was to fight with regard to the expenses that were involved in the patent suit, and that in the ultimate outcome cooperation was better, and that is the point of the relevancy of this.

4419 The Government offers in evidence Exhibit 1426, which is a letter dated November 8, 1932, from Mr. Pickard to Mr. Yerkes.

(Letter from Mr. Pickard to Mr. Yerkes dated November 8, 1932, was received in evidence and marked "Government's Exhibit No. 1426.")

Mr. TURBRIDY. It is captioned "Interview with Mr. Lissmann, Head of Kalle Cellophane Business at Biebrich."

It reads:

"Confirms our previous understanding that I. G. controls Wolfe

Company financially, but under contract cannot dictate manufacturing or selling policy during life of the elder Wolfe.

"There is a selling agreement between Kalle and Wolfe covering the territory granted Kalle by La Cellophane of France, by which Kalle is entitled to 82% of the business and Wolfe 18%. Territory outside the Kalle concession is open to Wolfe.

"In the Kalle territory 60% of the trade is in Germany. A little trade in China, which, while unimportant now, is growing. Sidac cannot sell in Germany on account of duty of approximately 1½ Marks per kilo., but in Kalle's territory outside of Germany Sidac has about 25%.

"Bemberg cellophane is being used quite extensively for hat trimming, but so far has not been offered to the trade
4420 in sheets.

"There is no exchange of manufacturing information between Kalle and Wolfe, nor of plant visits. Difference in process is chiefly in extrusion process, Wolfe running solution over a large wheel.

"Feldmuhle is a very large paper concern, making about 500 kilos. a day of cellophane (quality fair) as a side line, which is sold through their paper dealers. Three legal actions are now going on with them:

"1. Action by Kalle against Feldmuhle on Brandenburger viscose patent. Won in first court and appealed.

"2. Counter suit to above to nullify Brandenburger patent.

"3. Suit by Wolfe Co. against Feldmuhle on the big drum process. Wolfe won in the first court. Now in second court on appeal and chances believed against Wolfe.

"There is a great deal of new cellophane competition in Germany and Europe in general. Langheck (spelling phonetic) has a factory, using Broz process. Formerly a well known gelatine firm. Factory at Prague, but have taken license for Germany. There is a Broz (pronounced Brosch) factory at Aussig in Czechoslovakia with production of 5,000 sq. meters daily in eight hours. Not continuous process. The Czech
4421 consumption is given at 15,000 sq. meters a day, so by working continuously entire consumption of country could be covered by this little and very low cost plant. They work under an old English patent of about 1889. This process with knowhow has been sold to a company near Milan, Italy, and to another company in Holland.

"Italian Sidac exporting to many countries but not to Germany on account of duty.

"There is still another Italian company, name not given. Opposition to our waterproofing patent is chiefly by Rado & Wolfe. Former is a patent pirate in Berlin."

The Government offers in evidence Exhibit 1427, which is a letter from Mr. Jenney to Mr. Yerkes dated November 16, 1932.

Government's Exhibit 1427

(Letter from Mr. Jenney to Mr. Yerkes dated 16th November, 1932, was received in evidence and marked "Government's Exhibit No. 1427.")

The Court. Before you go on, I have not got the import of 1426. This refers to European litigation, is that correct?

Mr. Tubridy. We go paragraph by paragraph in 1426. One states, "There is a selling agreement between Kalle and Wolfe covering the territory granted Kalle by La Cellophane of France, by which Kalle is entitled to 82% of the business and Wolfe 18%."

4422 The Court. You want to show that this was a carrying out of the arrangement between the European parties intersese in the European theatre?

Mr. Tubridy. Yes. It is part of the scheme and plan. They are all inter-allied, have agreements one with the other and it is part of a general plan.

With regard to this other paragraph in 1426, your Honor, it indicates the fact that in the year 1932 any number of people were engaged with regard to cellophane, they had cellophane processes.

The Court. In Europe?

Mr. Tubridy. Yes.

Mr. Gesell. But it isn't contended they are all part of some general plan, is it?

Mr. Tubridy. No, it isn't—very minor, small people.

Mr. Gesell. It doesn't say that.

Mr. Tubridy. It indicates by the amount of production they produce what the production capacity is.

The Court. Let us take up 1427.

Mr. Tubridy. 1427 reads:

"A report that the Sidac Company has organized a British Sidac Company and purchased a plant formerly belonging to Neura Artificial Silk Company has been confirmed by Mr. Piani. Apparently this action was taken without consultation with

4423 our French friends, and is another indication of the unstable nature of the Cartel.

"I am giving Mr. Pickard a copy of this letter, and he will, no doubt, discuss it with Mr. Bernheim, in the event he has an opportunity to do so before his return."

The Court. What cartel was Mr. Jenney referring to there, Mr. Tubridy?

Mr. Tubridy. The same cartel we are referring to, sir.

The Court. Proceed.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1428, which is a letter from Mr. Haslett to Mr. Yerkes dated August 25, 1933.

(Letter from Mr. Haslett to Mr. Yerkes dated 25th August 1933 was received in evidence and marked "Government's Exhibit No. 1428.")

Mr. TUBRIDY. It reads:

"On hearing that you had left for Europe it occurred to me that amongst other matters you might be discussing a revision in the allotment of world territories with the various European transparent sheeting manufacturers." I would like to interject and call your Honor's attention that this is Canadian Industries Limited talking now, seeing if they cannot get more territory because they are circumscribed as to territory. "If such a discussion does take place it might be possible to procure for our company
4424 some rights in the various territories comprising the British Empire as whilst, owing to the Imperial preferential tariffs, manufacturers in the United Kingdom should be at an advantage over the French Cellophane Company we in Canada, on the other hand, would be capable of competing on equal tariff terms with United Kingdom manufacturers.

"I am writing this letter in order that you will have us in mind if and when territories are discussed, as any additional volume which can get for our Shawinigan Falls plant will be of tremendous benefit to us and both the DuPont Cellophane Company and E. I. DuPont de Nemours and Company will of course derive additional profit through the reduced costs. Furthermore, our position opposite Sylvania competition will be strengthened by any export business as our present incapacity to export would place Sylvania theoretically in a favoured position should they decide to erect a Canadian plant.

"We recognize, of course, that the French Cellophane Company may not wish to part with any portion of their market without some consideration but it is quite possible that reference to the existence of a 'Cellophane' plant within the British Empire may strengthen the French case in negotiating for territories with other transparent cellulose manufacturers, some of whom have plants in the United Kingdom, and we would naturally be prepared to make some royalty payment to the French Cellophane Company for export rights.

"In the past we have received numerous applications
4425 from our Canadian converters to be allowed to export fabricated 'Cellophane' to Australia and New Zealand, on the grounds that they are producing a better product than other Empire converters, and quite lately these applications have been renewed. Whilst we have been very rigid in refusing to supply an

'Cellophane' for export there is always a risk that these converters will carry out their threat to purchase Sylphrap and on exporting their converted product they will then be able to obtain draw-back of the Canadian duty paid. Whilst the French Cellophane Company may argue that they are not concerned with the competitive situation in Canada, they should recognize that this competition from Canadian converters is inevitable, especially in view of the efforts of the Canadian Government to expand exports of manufactured goods, and in that case it will be definitely to their benefit if they make arrangements with C. I. L. for the payment of a royalty on all such business.

"If you are in a position to assist us to extend our market in the way I have suggested, I hope you will call on me for any further information you may require in this direction.

"Yours very truly,

"L. W. HASLETT."

The Government offers in evidence Exhibit 1429, a letter from Mr. Bernheim to Mr. Yerkes, dated September 19, 1933.

(Letter from Mr. Bernheim to Mr. Yerkes dated
4426 September 19th, 1933, was received in evidence and marked "Government's Exhibit No. 1429.")

Mr. TUBRIDY. It reads:

"I hope you had a fine trip over and that you and Mr. Yerkes proved again to be expert sailers.

"I have seen Mr. Brandenberger and I have told him of your suggestion regarding Canadian industries to take up the deliveries of England and Dominion against royalty to the Cellophane Company. We believe that this proposal is only to be considered by the French Cellophane Company when she will be in the impossibility to fight on these markets, which seems not to be the case yet. Mr. Brandenberger, of course, is of opinion that he is to keep his customers in these markets as long as posible and that he must continue to try to keep up a normal production for the maintenance of his mill and the reduction of his expenses and costing price.

"The figures of the sales in the British Dominion (Australia), India, South Africa, are small; the total for 1931 was 23½ tons, for 1932 tons 30,000, for the first six months of 1933: 9,500 tons; but since July the deliveries are increasing very much and it is likely that the total figures for 1933 will be superior to the total figures of 1932. You will find below the prices at which the French Cellophane Company is selling with the detail of commission and other expenses deducted of the net prices obtained.

4427 . "You will see that it is not very tempting. What are the differences of the net selling prices on the net cost of the Canadian industries and on your net cost?"

Then follows the figures mentioned in the letter which the Government will not read.

The Government offers in evidence Exhibit 1430, which is a letter from Mr. Yerkes to Mr. Haslett dated September 21, 1933.

(Letter from Mr. Yerkes to Mr. Haslett dated September 21, 1933, was received in evidence and marked "Government's Exhibit No. 1430.")

Mr. TUBRIDY. It reads:

"I received your letter of the 25th a few days before I sailed from the other side.

"I had an opportunity of discussing with Mr. Bernheim the contents of your letter and I put forth all the arguments which were available. The most I can say is that I sowed the seed in Mr. Bernheim's mind and he promised to give the matter serious consideration.

"The fact is that the English Cellophane business is in a very complicated state. The Sidac Company and the French Cellophane company are having a law-suit instituted by the French and as I understand the matter if the French win they may have the English rights exclusively to themselves, which would of
4428 course include the British Empire. If, on the other hand, the French lose it is probable that the British Empire rights will have to be divided with Sidac.

"All of this means that nothing can be done until the suit between the French Cellophane Company and Sidac is settled some way or other. Your guess as to when this will happen is as good as mine, but from past experience I imagine a year would be the minimum.

"At any rate the matter is on the table. I think it would be entirely in order for you or me to write to Bernheim in the course of a few months, referring to my conversation and asking him what the status is, in order not to have it die.

"Yours very truly."

The Government offers in evidence Exhibit 1431, which is a letter from Mr. Haslett to Mr. Yerkes dated September 26, 1933.

(Letter from Mr. Haslett to Mr. Yerkes dated 26th September 1933 was received in evidence and marked "Government's Exhibit No. 1431.")

Mr. TUBRIDY. It reads:

"DEAR MR. YERKES: I thank you for your letter of 21st September regarding the complicated state in which the English and British Empire 'Cellophane' business seems to be.

4429 "I am very grateful to you for bringing your position before Mr. Bernheim and I quite appreciate that the most we can hope for at present is that he will give it some consideration. Inasmuch as Mr. Bernheim may want to avoid the capital cost of

providing manufacturing facilities with the British Empire until his relations with Sidac are clarified, he might be able to purchase Canadian made 'Cellophane' on a temporary basis, which would be more profitable than exporting from France.

"As you suggest, I will bring this matter up in the course of a few months, but before writing to Mr. Bernheim I will get in touch with you again."

The Government offers in evidence Exhibit 1432, a letter from Mr. Yerkes to Mr. Bernheim dated September 27, 1933.

(Letter from Mr. Yerkes to Mr. Bernheim dated September 27, 1933, was received in evidence and marked "Government's Exhibit No. 1432.")

Mr. TUBRIDY. It reads:

"We had a nice trip back; it was pretty hot but no bad weather.

"I naturally cannot see your argument as set forth in your letter of September 19th regarding the English and Dominion situation. I think Brandenberger in trying to hold on to this business is what we would call 'clutching at a straw.' The English and Dominion business is certainly going to be made from pro-
4430 duction fabricated within the British Empire. I think that is as clear as anything can be.

"However, I am going to send your letter of the 19th to Mr. Haslett, the Manager of the Cellophane Division of Canadian Industries Limited, and will ask him not only to answer your questions but perhaps to discuss further the question in any way that he sees fit.

"I appreciate your interest in this matter and still have hope that something may be worked out."

The Government offers in evidence Exhibit 1433, a letter from Mr. Haslett to Mr. Yerkes dated December 4, 1933.

(Letter from Mr. Haslett to Mr. Yerkes dated 4th December 1933 was received in evidence and marked "Government's Exhibit No. 1433.")

Mr. TUBRIDY. It reads:

"I send herewith copy of a letter which I have written to-day to Mr. Bernheim in reply to his letter of 19th September to you.

"I regret that it has not been possible to work anything out which will be to our mutual advantage but I am very grateful to you for having placed our proposition before Mr. Bernheim and for having given us an opportunity to expand our fields."

The Government offers in evidence Exhibit 1434, which is a letter from Mr. Bernheim to Mr. Yerkes dated October 9, 1933.

4431 (Letter from Mr. Bernheim to Mr. Yerkes dated October 9th, 1933, was received in evidence and marked "Government's Exhibit No. 1434.")

Mr. TUBRIDY. It states:

"I acknowledge receipt of your lines of September 27th.

"We await the letter of Mr. Haslett, the manager of the Cellophane division of Canadian Industries Limited, and we will send you copy of the French Cellophane Company's own answer to their suggestions and arguments."

The Government offers in evidence Exhibit 1435, a letter from Mr. Haslett to Mr. Yerkes, dated February 13, 1934.

(Letter from Mr. Haslett to Mr. Yerkes dated 13th February 1934 was received in evidence and marked "Government's Exhibit No. 1435.")

Mr. TUBRIDY. It reads:

"I send herewith copy of a letter which I have written to Mr. Bernheim regarding export. After discussing this matter with you early in the year I re-examined the situation insofar as the supply of moistureproof 'Cellophane' was concerned, but inasmuch as for policy reasons, dictated by I. C. I., we could not supply the U. K. market we have definitely decided that any arrangement which we could make with the French Cellophane Company would not be sufficiently attractive to us, largely in view of the very low prices which prevail in Empire markets.

4432 "I thank you for the efforts which you made on our behalf in putting our case before Mr. Bernheim and I regret that we are not in a position to follow the matter up further."

The Government offers in evidence Exhibit 1436, a letter from Mr. Haslett to Mr. Bernheim, dated December 4, 1933.

(Letter from Mr. Haslett to Mr. Bernheim dated 4th December 1933 was received in evidence and marked "Government's Exhibit No. 1436.")

Mr. TUBRIDY. It reads:

"Mr. Yerkes has handed me a copy of your letter to him dated 19th September in which you refer to the suggestion made by Mr. Yerkes that you could perhaps utilize our Canadian plant for supplying certain British Empire countries with 'Cellophane' on a basis that would enable you to compete more successfully with British manufacturers than is possible at present.

"After perusing the statement attached to your letter to Mr. Yerkes and after examining more thoroughly the advantages which we would enjoy through the preferential duties now in force, I find that the selling prices ruling in Australia and South Africa would not permit us to handle this business at a profit after deducting some royalty payment to yourselves. Although in the case of India the profit would be greater, there is at present no preferential rate and the tariff from both France and Canada would be identical.

4433 "I am very grateful to you for supplying the figures showing the net selling prices realized by you in the various markets, and if at some future time you feel that it may be possible to utilize our factory in the way we suggested, either owing to an increase in the preferential rate or for some other reason, I hope that you will not hesitate to place the proposition before us."

4434 Mr. TUBRIDY. The Government offers in evidence letter from Mr. Chase to Mr. Yerkes dated the 5th of December, 1933, as Government Exhibit 66.

(The letter from P. H. Chase to Mr. L. A. Yerkes, dated December 5, 1933, was received in evidence and marked "Government Exhibit 66.")

Mr. TUBRIDY. (Reading.) "While in Paris at the end of last week Mr. Rene Bernheim asked me to call to discuss an investment that might be of interest to our Company.

"Upon meeting he stated that there were 14,400 shares of the Sylvania Corporation which could be purchased at a price of $17.50 per share, which he considered a very attractive price. I told him that, while reporting the matter to my Company, I had a strong doubt that we would be interested in such a transaction. We had nothing to gain by becoming a shareholder in the Sylvania Corporation, which is our competitor. The only thing that might be interesting would possibly be to secure the majority of it, but while it is not certain that we would want to do this, we would anyway come under the Sherman Anti-trust Law, which would be out of the question.

"Mr. Bernheim then said that there was another deal that might take place, as he had been informed that the following shares could be bought at the prices shown below:

"35,600 shares of Interchimic at B. Fcs. 500 each.

4435 "7,500 capital shares of Sidac at B. Fcs. 1500 each.

"6,000 dividend shares of Sidac at B. Fcs. 980 each.

"12,400 ordinary shares of Sidac at B. Fcs. 20 each.

"You are familiar with the distribution of the capital of Sidac, regarding which we have written you in the past. We can refer you in that connection to Mr. Ewing's letter of July 7th enclosing copy of the writer's letter of July 5th, 1933.

"As to Interchimic, this is the name adopted for short by the Company itself and means Compagnie Internationale des Industries Chimiques. This is a holding Company which owns shares of British Sidac, Italian Sidac, Sylvania Corporation, and International Safety Films, Ltd. This latter concern, which does not amount to much, has been formed to exploit films made from Cellophane. The amount of Sylvania Corporation shares owned by Interchimic is 180,000.

"Mr. Bernheim thought that there might possibly be some interest in his Company and ours securing those various shares. The point is that Sidac owes to Comptoir Fcs. 7,000,000 and is negotiating at the present time to clear the debt by making payment with their own shares. The amount thus received and the other shares mentioned above which are on the market, plus the Sidac shares already owned by the Comptoir, would give to this last concern a clear majority in the Sidac Company. At
4436 the same time, since there are 100,000 shares of the Sylvania Corporation owned by the Sidac Company, it was Mr. Bernheim's thought that we might thus secure control of the Sylvania Corporation and without coming under the Sherman Anti-trust Law, since the Sidac shares could be held either jointly with the Comptoir or, if shared, would not theoretically give us an absolute majority.

"However, a more complete examination of Mr. Bernheim's documents showed that the 35,600 shares of Interchimic only represented a small minority of the capital of that concern, so that his scheme regarding obtaining control of the Sylvania Corporation would not work, even if we had been in favor of it, which I doubt. On the other hand, further conversation with Mr. Bernheim brought out that he was rather dubious himself as to whether to secure the majority of Sidac, if feasible. This would do away with a good deal of the trouble they have had up to now, but would oblige the Comptoir to have constant dealings with the ancient employee who founded Sidac, and who is very hard to get along with. I suggested retiring him on a pension, if necessary, but Mr. Bernheim stated that he was at the same time very active and most unreliable, and that he would probably then be starting again in new competition.

"While Mr. Bernheim was in favor of cabling to you in order to find out if you would be interested in such a deal as mentioned above, the unconfirmed news that the Sidac parcel of shares
4437 had been purchased by the Banque Commerciale de Belgique caused us to hold the matter over until more definite information as to the disposal of that parcel was obtained. In the meantime I am reporting the matter to you by letter.

"As to the seller of those shares, Mr. Bernheim, in the course of our talk, mentioned that it was the Banque Populaire Belge, but, when I wanted to make a note of it, said I had better forget it. I told him I knew all about that Bank, which seemed to surprise him, but he agreed that my information was correct when I stated that it had been formed in the past by the Belgian Socialist Party, which is affiliated to the Second International Union formed at the Amsterdam Congress, that the same Bank had been started

under the influence of Vandervelde, Head of the Belgian Socialist Party, and that it had furnished the money to start the Belgian Sidac.

"We will not fail to pass on to you any further news we may obtain on this matter."

The COURT. You have told me that Mr. Chase worked for duPont. Can you tell me whether he was British, Mr. Gesell?

Mr. GESELL. I don't believe he was, your Honor, but I don't know for sure about that. He was over there a long time as an employee in the Paris office.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1438, from Mr. Chase, page 13, 14 and 15, a memorandum from Mr. Chase to Mr. Ewing.

4438 (Pages 13, 14 and 15 of the memorandum from Mr. Chase to Mr. Ewing were received in evidence and marked "Government Exhibit No. 1438.")

Mr. TUBRIDY. I will read from the middle of the page which states "General."

"Efforts have been made by the principal European manufacturers of transparent Viscose film"——

The COURT. Will you excuse me? Where are you reading from? My exhibit starts at page 13.

Mr. TUBRIDY. Yes, sir. I am reading from the middle of the page, where it states "General."

Mr. GESELL. They are not offering the first twelve and a half pages of the exhibit, your Honor.

Mr. TUBRIDY. This is a report and the part of the document that is pertinent and relevant to the case appears on this part of the report.

The COURT. That is all right. I just want to be informed.

Mr. TUBRIDY. (Reading) "Efforts have been made by the principal European manufacturers of transparent Viscose film to bring order into that industry, which threatened at one time to become chaotic. As already stated in this report, quite a number of new manufacturers have sprung up and any Rayon plant which did not make any more money was considering producing transparent Viscose film. The resulting situation was a very bad one, as

4439 all kinds of different prices were quoted and the poor quality of some of the products sold was detrimental to the reputation of good transparent Viscose film. There has, therefore, been in every country an effort made to try and stabilize the industry. Fortunately the business depression has been the cause of the disappearance of the concerns that were not fitted financially and technically to enter that industry. The change in the control of the Belgian Sidac will undoubtedly result in much more stable

conditions generally. France, due to reasons which we have outlined above, is perhaps one of the countries in which this stabilization has not yet been pushed as far as is desirable, but the French Cellophane Company have this end in view and will not fail to exert their best efforts in this connection.

"As already reported, the German, Belgian, French and Italian producers have also decided to get together in order to reach an agreement concerning export markets. That meeting was to have taken place at first on October 8th. It has been put back successively to the 13th, then the 18th, then the 23rd, and finally the 26th of the same month. Those delays are not due to any objections to the proposed agreement, but it is always difficult to find a date that will be suitable to so many people coming from different countries."

Then I will skip the next four paragraphs, sir, and read the last paragraph on that page.

"One last remark which I should perhaps have made
4440 when discussing the tendency towards stabilization of the transparent Viscose film industry is that, while several of the plants have been closed down, they remain however a potential danger unless dismantled, as there is always the possibility that either misguided capitalists or shady business men with blackmail in their mind may again start those plants working. It is to be hoped, therefore, that through some means or other those superfluous plants which constitute an excess capacity will finally be done away with."

Mr. MINICUS. Does your Honor still require an answer to your question about Mr. Chase's identity, sir? We have a short biography——

The COURT. Just answer the question whether he was or was not British.

Mr. MINICUS. I think the inference is clear from this. In 1915 he started in this country as an employee of the duPont Company, as a plant supervisor.

The COURT. Proceed, Mr. Tubridy.

Mr. TUBRIDY. The Government offers in evidence Exhibit 1439, a letter from Mr. Prall—Mr. Pralatowski is the same gentleman, sir—to Mr. Yerkes, dated December 16, 1934.

Mr. GESELL. Except this letter is from Mr. Pickard, is it not? Not Prall.

4441 Mr. TUBRIDY. I will accept it sir. Mr. Gesell is probably right.

The COURT. May I write down Pickard?

Mr. GESELL. The middle initial is W, and I am sure this is Mr. Pickard, the gentleman who was over there. Mr. Pralatowski is a technical man appearing in this country.

Mr. MINIEUS. Mr. Prall's initials are F. M.

Mr. GESELL. All right, it is Mr. Prall.

Mr. TUBRIDY. It is a very minor thing, sir. We were misled by the initials "F. M."

(The letter from F. M. P. to Dear Len, dated December 16, 1934, was received in evidence and marked "Government Exhibit No. 1439.")

Mr. TUBRIDY. It reads:

"I have just come from a couple of hours with Rene Bernheim who gives me the following information very confidentially to be transmitted to you only.

"Control of Sylvania, through liquidation of Belgian labor bank, has passed into the hands of some of the Solvay group, said to control 285,000 of 421,227 issued shares. (The figures are Bernheim's.)

"They appear anxious to dispose of their various holdings in this and other concerns. Mr. Jansen (or Jensen), one of the principals, sails for New York on the Ile de France Tuesday. This letter should go on the same boat.

"Whether our legal department would consider
4442 purchase of Sylvania O. K. or not (if you wished to do so and could make a good deal) I do not know, but of course there is other competition.

"Anyhow Bernheim has telegraphed Mr. Jansen"——

Later it will appear, sir, that he becomes the president of Sidac Corporation. That is why it is pertinent here.

The COURT. Yes.

Mr. TUBRIDY. (Reading.) "Anyhow Bernheim has telegraphed Mr. Jansen that you will be glad to make his acquaintance in New York. You can make an appointment with him at the Ritz. He He is a good man to know, aside from the Sylvania, as he is said to be the head of the banking and investment interests of Solvay group. Possibly Walter Carpenter might like to meet him with you.

"Bernheim has been talking cooperation with him, as regards their own competition. Incidentally, he wishes to withdraw our rights in South America on Cellophane. He elaborated on the reasons for this at some length. I remained quite silent.

"Rene also informs me [or rather Bizot did] that the Italians are concerned about our plans on rayon in the Argentine, and want participation in it. Otherside they threaten to build another plant. Bizot will advise them that he knows nothing about
4443 our attitude towards such a proposal, which will string the matter along for a month or two."

The Government offers in evidence Exhibit 67, which is dated January 3, 1935, entitled "Memorandum of Conversation at Luncheon with Baron Janssen and Albert Blum."

Government Exhibit No. 67

(The Memorandum Of Conversation at Luncheon with Baron Janssen and Albert Blum was received in evidence and marked "Government Exhibit No. 67.")

Mr. TUBRIDY. (Reading.) "Baron Janssen was a very intimate and close business and personal friend of Edmind Gillet and since his death has been in the same position with Charles Gillet."

Mr. GESELL. May I interpose and ask who the Government says wrote this memorandum?

Mr. TUBRIDY. I just have on it that it says, "Noted W. S. C. Jr.", which is Mr. Carpenter, a very important official in the firm.

Mr. GESELL. I am not suggesting that there is any reason not to read it. I think the record ought to show just who wrote the exhibit. If you don't know I will be glad to tell you.

Mr. MINICUS. The Government contends that Mr. Yerkes wrote this exhibit, your Honor.

Mr. GESELL. I agree with that.

The COURT. To whom did he write it?

Mr. MINICUS. I think it was just a memorandum for
4444 his own file, sir.

Mr. TUBRIDY. (Reading.) "He and Charles Gillet between them have control of the Belgian Sidac by the ownership of over 50% of the shares. They also between them have control of the Italian Sidac, and through the Belgian Sidac had control of the English Sidac. This English Sidac Company has just recently sold out to the new Courtaulds-La Cellophane Company, for which the English Sidac received 200,000 pounds. Baron Janssen is president of Belgian Sidac.

"Baron Janssen feels that the Belgian Sidac Company is more or less finished; that the market in Belgium is small and their biggest export field which was England now being closed to them there isn't much future for the Belgian Company except through the outside holdings which they have.

"The Sylvania Company has outstanding no bonds and no preferred stock and 421,257 shares of common stock. Of this the Belgian Sidac have 100,000 shares, the Societe Interchemic (a holding or investment company) have 190,000 shares, and the Labor Bank of Belgium 12,000 shares. Wallach owns 50,000 shares and the balance is distributed in small holdings both in this country and in Belgium.

"Baron Janssen mentioned the fact that Mr. Webber of Allied Chemical Company, on the occasion of a recent visit of Dr. Wallach, had suggested that Allied buy control of Sylvania, to
4445 which Dr. Wallach replied that Sylvania was not for sale.

Baron Janssen added that he did not consider the Allied

Chemical Company were the proper people to take over control of this company. (The Solvay group are supposed to have 500,000 shares of Allied Chemical Co. stock).

"He told us that Wallach had 14 machines operating and that two more were being constructed in Belgium which would make a total of 16 machines; that their business was almost exactly 50% moistureproof and 50% plain, and that Wallach had informed him that he was unable to supply the demand. Baron Janssen had been at Fredericksburg and had a very high opinion of the plant and the organization and the way the entire business was being run. He is not particularly favorable towards Dr. Wallach; at the same time he feels that he is smart and active and has done very well with the Sylvania Company. They are paying $1.00 a year dividends, but could easily pay more according to his statement.

"Baron Janssen stated quite definitely that he could deliver the 190,000 shares which are now in the Interchemie, plus the 13,000 shares in the Belgian Labor Bank, at $25.00 per share. This is only a total of 203,000 shares, but he was positive that odds and ends could be picked up to a total of 210,000 shares which would give definite control, with a possibility of 220,000 shares. He stated that he and Charles Gillet would not sell their 100,000 shares but would enter into any gentlemen's agreement
4446 under which the voting or control of this 100,000 shares would be placed at the disposal of the majority holding if necessary.

"He left us with the definite impression that he was not offering this proposal around in any sense of the word; that he had come over here purely to see a brother of his who is quite ill, and that this conversation was a result of his talk with Bernheim and Gillet in Paris before he left, which was in turn reported to Pickard.

"Both Albert and I have the definite impression that he will not talk over this matter with any other possible purchaser until he hears something further from us. As he is sailing back on Saturday (Jan. 5th) he understands clearly that whatever word he gets from us will be later on, upon his return to Brussels.

"I feel that the thought behind all this is probably due to the fact that he knows through Charles Gillet that we are not particularly keen about Wallach, that we have had lawsuits with them over the trademark name, etc. etc., all of which does not add to the earnings of the Sylvania Company.

"The story is different from Pickard's letter in that the 100,000 shares owned by Gillet and Janssen through the Belgian Sidac are definitely not for sale.

"He mentioned, incidentally, that Wallach was already producing caps and bands in apparently a satisfactory way and was

getting ready to produce nitrocellulose sausage casings.
4447 He evidently thinks of Wallach as a shrewd and able and perhaps annoying competitor.

"I explained to Baron Janssen that it was entirely out of the question for the Du Pont Company or the Du Pont Cellophane Company to consider any proposal looking towards control of Sylvania.

"Baron Janssen is a Belgian; lives in Brussels; is a man I should think of about 50, attractive, straightforward; he speaks only a few words of English.

"He mentioned, incidentally, that he had an interest in the Tubize Company of America which he did not look favorably upon."

4448 The COURT. Mr. Minicus, does your book of dramatis personae show who the Solvay group is?

Mr. MINICUS. It does not, your Honor.

The COURT. Will I be informed of that fact?

Mr. TUBRIDY. I think this is the only place it comes up in this connection.

The COURT. Well then, I will forget it.

Mr. TUBRIDY. The Government has already offered in evidence Exhibit 1441 at page 636 of the transcript. That is the British Cellophane Limited and British Sidac Limited agreement.

The Government offers in evidence Exhibit 1442, which is a letter from Mr. Hatt to Mr. Jenney, dated June 13, 1938.

(Letter from Mr. Hatt to Mr. Jenney dated June 13, 1938, was received in evidence and marked "Government's Exhibit No. 1442.")

Mr. TUBRIDY. It reads:

"Just a memorandum confirming conversation with Vice President Crane and yourself a day or two ago regarding our European connections.

"Mr. Brandenberger recently advised that they had been having discussion with other transparent sheet manufacturers in Europe in relation to a world cartel. The list of the attendants
4449 seemed to cover everybody, large and small, in Europe; and their final determination was to make a cartel in all countries except the Western Hemisphere.

"They are, of course, as the original patentees and licensors, required to cooperate in keeping everybody out of North America north of the Panama Canal on account of their earlier relations with us, and in South America we are to enjoy equal rights with the French as a result of later negotiations having to do with the French ownership of Sidac stock of the Belgian company.

"Their decision in the cartel was to leave South America as open territory, having no restrictions as to quota or the prices to be

quoted. We would not be interested in making a definite cartel arrangement with them in South America, altho they suggested that the other manufacturers would be willing to consider doing so with us if we would offer them a price differential of 5% in their favor in that country. We are not disposed to do this. In the first place, the French, who assumed originally to control world markets on this commodity, have given us equal rights with themselves. Obviously they cannot give away any part of that market without infringing on these rights to us. We own what Moisture-proof patents there are in the South American countries pretty generally and these cover practically all of our products and processes except in Brazil where we do not enjoy the original product patent. We do have in that country, however, the
4450 heat sealing patent and the resin wax mixture, so that we have some restraint on the sale of Moistureproof even there.

"The French are entitled to licenses under any of these Moisture-proof patents in any of those countries for their own product and their own use but not to be bargained to anybody else. The growth is liable to be very largely Moistureproof so that this restriction may be important in the development of that market. In the past the sale of plain transparent sheeting (not Moistureproof) has been largely on a price basis; and for quite a while we have maintained a price of 2.8 cents per square meter c. i. f. foreign ports, subject only to an agent's discount in any of those markets. Recently we learned from the French that they had felt obliged, on account of competition, to take this price down to 2.4 cents per square meter, and in one country I believe as low as 2.3 cents per square meter.

"Since my return from there we have been considering, while we were carrying on advices with the French as to what we found there in the way of prices, whether we would reduce our base price to their level. We have not had a reply from a rather lengthy letter from me some weeks ago setting forth the situation there, but ultimately we shall probably reduce the price to the Duperial Companies to a basis of 2.4 cents per square meter subject to their discounts.

"We are not suggesfing that you raise this question
4451 with the French but this is more to inform Vice President Crane and yourself what the situation is at the moment in case they open the question with you. Kalle have no rights in South America and neither does British Cellophane except in the British colony of Trinidad, Jamaica and British Guiana, inasmuch as they are confined to the British Empire.

"There is no point in discussing these minor markets with them on this basis inasmuch as I believe British Cellophane is excluded

from the cartel as I believe we are, as they operate only within their British restricted territory.

"We have no matters of interest to discuss with British Cellophane, but you are familiar with the fact that we have recently had two men over there to inspect their plant at their request, to make sure whether the machinery was installed and operating as it should be, and because of their relative youth in the sale of transparent sheeting there is not a great deal that they could give us that would be of substantial interest. We have no relations in the other countries which you are visiting inasmuch as these are covered directly by the French. I think this comprises the total of any information that might be of interest in connection with your proposed trip."

Those notations, sir, on the first page have not come out very well in that copy but they do appear on the negative and
4452 they state, "Very few": "Charch & Prindle in Chile, Colombia, Cuba, Venezuela, Porto Rico (and two others), Philippines (and five others)". Then it says, "7 patents and/or applications in Argentina were assigned to Duperial." It says, "plus 2 in Mexico (resin wax and heat sealing): 1 in Brazil (resin wax); 3 in Uruguay (2 adhesives); one method of affixing labels."

The Government offers in evidence Exhibit 1443, letter from Mr. Hatt to Mr. Brandenberger, dated May 31, 1938.

(Letter from Mr. Hatt to Mr. Brandenberger dated May 31, 1938, was received in evidence and marked "Government's Exhibit No. 1443.")

Mr. TUBRIDY. It reads:

"I wrote you some weeks ago about the price situation in South America on 'Cellophane' and similar products and I thought by this time I would have heard from you as to what you thought might be done, if anything, to improve that situation. Not having heard from you in the meantime, I am sufficiently interested to inquire just what you think about the present program and whether there have been any further discussions with othe European manufacturers as to what that situation requires."

The Government offers in evidence Exhibit 1444, which is a letter from Mr. Brandenberger to Mr. Hatt dated June 16, 1938.

(Letter from Mr. Brandenberger to Mr. Hatt dated
4453 June 16, 1938, was received in evidence and marked "Government's Exhibit No. 1444.")

Mr. TUBRIDY. It reads:

"Thank you for your letter of May 31st.

"I have been so busy these last few days it has been impossible for me, up until now, to answer your letter of April 13th; nevertheless, since the receipt of this last letter we have made an

inquiry in Brazil and Argentina and we are still waiting for an answer to it.

"We have also had in the meantime consultations with the International Convention and I will keep you in touch with these conversations when I answer your letter of April 13th in the next few days. I pray you to be patient for a little while. Please excuse me for being so tardy in my answer."

The Government offers in evidence Exhibit 1445, which is a letter from Mr. Brandenberger to Mr. Hatt, dated September 6, 1938.

Government's Exhibit 1445

(Letter from Mr. Brandenberger to Mr. Hatt dated September 6, 1938, was received in evidence and marked "Government's Exhibit No. 1445.")

Mr. TUBRIDY. It reads:

"DEAR MR. HATT: Because I have been so busy, and because so much work accumulates during the vacation period, I have been unable to reply sooner to your letter of April 13. I ask your
4454 pardon and at the same time I confirm my letter of June 16.

"Your information concerning the South American situation in general, and particularly in Argentina and Brazil, was all the more interesting to me because it confirmed what we had already learned from our agents and representatives.

"There is no denying that development, especially in the Argentine and Brazilian markets, has suffered from the ill-considered price policy growing out of European and Japanese competition.

"To understand the tactics of numerous European producers it must be remembered that they mostly lack a sufficient market in their own country so that, cost what it may, they are forced to sell an important part of their production in the few countries still accessible to them. This necessity has been still further intensified by the totalitarian rule adopted in certain countries, which find themselves under the imperative necessity of procuring exchange even if it must be done by subsidizing exports.

"As for the Japanese, the problem presented by them is familiar to you and I shall not dwell upon it beyond confirming the idea that this competition has been less active since the Sino-Japanese war.

"Under such conditions it is difficult to accomplish anything constructive on an export basis, since the effort put forth seldom brings back a commensurate profit, at least not
4455 more than for a very fleeting time.

"Under the force of circumstances our Company, which laid the foundation for creation and development of all the world markets, finds that this very situation, deplorable as it is; neces-

sitates restricting our creative activity and adopting a defensive policy by offering our products to our customers at approximately the competing prices.

"In spite of that we have been unable (and this in spite of the constantly increasing demand for our products) to hold our position everywhere in the face of offers which are often beyond our possibilities, and I am not referring here to Japanese offerings.

"All the manufacturers of transparent foil are aware of this situation and it was with that in view, in the hope of finding a remedy, that the leaders among them have joined in an International Convention, actuated by a sincere desire to stabilize prices in South America.

"Since that time the opinions of S. I. D. A. C. and the Italian producers (CONFITRAS) in the matter of extending the Convention to South America have changed, and at a recent meeting these members reported that for the present they could not subscribe to an agreement with respect to South America. In spite of our efforts to uphold the opposite view we were unable to bring the Convention to the necessary state of agreement so that
4456 (at least for the present) it is apparently impossible to bring about a price accord for South America in our Convention.

"The reasons for this change of attitude are not hard to understand when it is considered that the International Convention came into being in a period of depression and falling sales, the brunt of which was being borne chiefly by S. I. D. A. C. and the Italian producers. Naturally this loss in volume dampened their enthusiasm.

"But it also caused the producers outside the Convention (British Rayophane, Nordisk Silkecellulose Noorkoping, Bata in Czechoslovakia, Dalle Freres and Lecomte-Bousbecque), who were able to carry off some large orders under cover of our advanced prices, to voice their scepticism concerning the ultimate success of the Convention which, for some countries, was based solely on a price accord.

"Another serious difficulty was encountered in the fact that you are selling a foil weighing 33 grams per square meter, i. e. 10% heavier than the standard European quality so that the customer, price being equal, would always be better off to buy from you unless you adopt a price 10% above that of European producers and, in general, in proportion to the metric weight of the foil.

"All this confirms what I told you at the beginning of this letter, namely that competition is sacrificing future welfare
4458 to the advantage of the moment and that it would hardly be possible to find a basis for a working agreement, other than a quantity discount basis.

"I must ask your pardon for dwelling at such length on this subject, but I feel that these details are necessary for an understanding of the situation.

"As for Argentina, we were aware of the harmful activities of Mr. Neumann, S. I. D. A. C. agent. Unfortunately, we believe, S. I. D. A. C. is not at present in a position to get rid of this agent, who owes them large sums of money. Moreover, it was for the purpose of restoring confidence and keeping watch on Mr. Neumann's activities that S. I. D. A. C. organized SIDO, Ltd.

"Obviously it is not easy, against such an unscrupulous agent, to give much consideration to an agreement unless some benefit can be obtained through quantity discounts.

"In Brazil the situation is entirely different since Japanese competitors were able, until a short time ago, to import freely. Hence the present unsatisfactory situation may be attributed to Japanese competition and their very low price quotations.

"Of course it is to be regretted that Mr. Flogny, in violation of an agreement entered into with our Company, is also selling Japanese foil. Nevertheless it should not be forgotten that Mr. Flogny himself built up the Brazilian market and then, little by little, saw it slip away to Japanese competitors against whom we were absolutely powerless. Undoubtedly Mr. Flogny, desiring to save the fruits of his labor and avoid losing his following in the trade, decided to fight this competition with its own weapons, and at present he is content with asking whether this policy has not been to our own interest since if Japanese competition had been left in just anybody's hands it would inevitably have closed the Brazilian market to us entirely, which is not the case at present. The customers know the difference in quality between our products and those from Japan, but they prefer the latter on the price basis. The fact that our agent has never stopped placing our goods in some quantity shows his desire to uphold our interests as well as can be done in the present state of the market.

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"Certainly there is no need to tell you that it is not at all my purpose to defend Mr. Flogny's actions. On the contrary, we are making an effort to correct the situation; but in my opinion it would be risky for us to dismiss the agent who introduced our trade mark to Brazil and has intimate knowledge of the market; we would thus merely throw him into the arms of our competitors. However that may be, I will come back to this subject when there is occasion.

"In view of the present situation we, like you, have concentrated our sales effort on moistureproof foil, but since we are always colliding with your low price we have not achieved the results we had expected. This is all the more re-

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grettable because we are the only dealers selling this quality in all South America, since the quality of competing products, especially that of S. I. D. A. C., does not even approach ours.

"At the same time it does not seem possible to stop competitors from selling their grade of moistureproof foil in South America, as long as they are not manufacturing under our patents. In this connection we invite your attention to the fact that many European producers are making a grade of moistureproof foil which is not comparable to ours in quality but which is capable of giving satisfaction for certain purposes.

"If North American territory has been considered outside the International Convention, the reason is that every member is left free to follow the policy which seems best. Indeed, we have no means other than license contracts by which we can stop competitors from exporting their products to North America, because most of the process patents have become public property.

"As in North America, and with still stronger reasons, we have no means of stopping our competitors from exporting to South America.

"You will have learned, however, that all this competition has been operating in South America for several years. Hence this territory, from the International Convention stand-
4460 point, is to be considered open to exports from all over the world with the exception of our licencees, assuming our agreement to remain valid and enforced. But I may add, to clarify the situation, that we have never licenced our rights in South America."

The Government has already offered in evidence Exhibit 1446, sir, at page 634 of the transcript.

The COURT. Recess for ten minutes.

(At this point a short recess was taken.)

4461 The COURT. Is it my understanding that we are now taking up Section 14 which provides for "La Cellophane as an Intermediator to Represent du Pont's Tarif, Price, and Patent Policies to Independent Foreign Producers"?

Mr. TUBBIDY. Yes, sir. The documents which are already in evidence which relate to that, sir, we have not discussed them here, but we have discussed them previously.

The COURT. I understand.

Mr. TUBBIDY. The next document, sir, is already in evidence as Exhibit 1045, and so, too, the one following as Exhibit 1046.

The Government offers in evidence Exhibit 1449, a letter dated December 19, 1928, from Mr. Pickard to Mr. Yerkes.

(The letter from Mr. Pickard to Mr. Yerkes, dated December 19, 1928, was received in evidence and marked "Government Exhibit No. 1449.").

Mr. TUBRIDY. (Reading.) "I had a long time with Messrs. Gillet and Bernheim yesterday afternoon and will give you below various brief memoranda covering subjects that were discussed by us:

"Brysilka—Nothing ne win connection with this company Mr. Bernheim says that their process is quite different from Bemberg's and that the I. G. G. will shortly start a Bemberg process plant in England.

4462 Kalle's technical agreement for Cellophane—Mr. Bernheim added that he wrote you last week regarding this. The Kalle people have apparently taken the ground that their original contract with the Comptoir covered all that is necessary; this, of course, is not correct, as the contract between the Comptoir and Kalle and the one between duPont and the Comptoir differ in respect to exchange of information. However, this is doubtless all covered in Mr. Bernheim's letter to you.

"Bemberg—The French are making about 1,400 pounds a day; the process is not working well and they have several difficulties in manufacture to work out; they do not seem enthusiastic about this process.

"Price Lists—You ask for a complete new price list; Mr. Bernheim says that this has recently been sent you.

"Wolff & Company—An arrangement has been made by which Kalle markets the Wolff product, on the basis of giving them 17% of the German market. They received business outside of Germany only with the consent of Kalle and the Comptoir.

"Cellophane Prices—I advised our friends of our reduction in the price of Cellophane, effective November 30th, which pleased them, as they still maintain that the danger of competition from the building of other plants in America is chiefly due to our maintaining prices at too high a level."

We will skip the next few paragraphs, and read the paragraph entitled "Belgian Cellophane Competition."

"You will remember my statement that the Belgian

4463 Cellophane plant is one of a number of interests of the same Belgian group. Mr. Bernheim confirms this and says that the group centers around a bank controlled by the Labour leaders in Belgium, which has several manufacturing enterprises, some of which are quite successful. The situation between the Comptoir and the Belgians has not improved, and their lawsuit is about to be heard in Court. They have not heard of any improvement in the technical process of the Belgian Company, but agree that their costs are very low, on account of cheap labor, and so forth * * * They are quite frank in saying that one or two of the men whom the Belgians took from the Comptoir are very able.

"Cellophane in Japan—Mr. Bernheim does not know which Japanese firm is making cellophane; their own sales there are rather small.

"Belgian sales of Cellophane in the United States—During the summer, Mr. Bernheim believes the Belgian sales were running in the neighborhood of 20,000 pounds, in the United States, per month. This is based on figures obtained when the plant was inspected, in connection with the lawsuit.

"Cellophane film—We have no discussion of this, as they stated they would have some films which they wished to show me on my return here in January; they are planning an early campaign in the smaller moving-picture houses in France."

The Government offers in evidence Exhibit 1450, which is a letter from Mr. Sparre to Mr. Carpenter and Mr. Pickard dated June 25, 1929.

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Mr. GESELL. It is to Mr. duPont.

Mr. TUBRIDY. To Mr. duPont, with copies to Mr. Carpenter and Mr. Pickard.

(The letter from Mr. Sparre to Mr. Lammot duPont, President, dated June 25, 1929, was received in evidence and marked "Government Exhibit No. 1450.")

Mr. TUBRIDY. "I have just sent a letter to Mr. Yerkes advising him that I was told today by Mr. A. J. Vollrath of the Werner & Pfleiderer Company of New York, that Wolf & Company of Germany is now arranging to commence manufacture in this country of transparent sheeting in competition with cellophane, using their German process which is, in some ways, different from the cellophane process, though probably infringing one or more of the cellophane patents. As you probably know, Wolf & Company is financially controlled by the I. G. which is understood to own 80% of their capital stock but the I. G. does not seem to control their actions in every way. This Mr. Vollrath explained as being due to the fact that Wolf & Company is a peculiar type of German stock company (Kommandit Action Gesellschafft).

"As you will remember, the I. G. also owns Kalle & Company which operates the cellophane process in Germany and which company, I understand, works harmoniously with the French and our Cellophane Companies, while Wolf & Company does not.

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"The interesting suggestion made today by Mr. Vollrath was that Wolf and Company's efforts in this country are not to be ascribed to the Wolf people themselves although they have shown a great deal of independence though practically owned financially by the I. G., but Mr. Vollrath thought that it was quite likely that the I. G. have taken advantage of the apparent independence of

Wolf & Company to have them take up transparent sheeting manufacture in America because Kalle & Company cannot do it. Mr. Vollrath insists that it is a fact that Wolf & Company are going ahead with their plans because his company have been requested to quote on equipment, but it can of course only be guessing as to whether Wolf & Company is doing this with or without I. G. approval.

"I want to add that Mr. Vollrath requested that his name should not be used inasmuch as he gave the information confidentially because of his long time connection with our Company in selling machinery and also because he has personnally invested a good deal of money in duPont stock. However, Wolf & Company have become one of his customers so that in that way he does not want his name mentioned.

"Mr. Vollrath also suggested that the I. G. might be interested financially in the American Cyanamid Company. He did not seem to have any general fact to go on in making this sug-
4466 gestion but only stated that he had been piecing together different kinds of information and rumors which have made him think that there might be some such connection. I am inclined to think that this is only guess-work on Mr. Vollrath's part though it is of course possible."

4467 The Government offers in evidence Exhibit 1451, letter from Mr. Yerkes to Mr. Bernheim, dated July 9, 1929.

(Letter from Mr. Yerkes to Mr. Bernheim dated July 9, 1929, was received in evidence and marked "Government's Exhibit No. 1454.")

Mr. TUBRIDY. It reads:

"DEAR MR. BERNHEIM: I have your letter dated June 27th regarding the negotiations between the Skenandoa Company and Wolff & Co. for the manufacture of Transparit. We are naturally disappointed that Wolff & Co. cannot be controlled by the I. G., and will be very much interested to know what reply Dr. Weidlich makes to your letter of June 27th.

"As a matter of fact, as we understand the situation the process used by S. I. D. A. C. is cheaper than that used by Wolff & Co., and as long as we are going to have competition over here from S. I. D. A. C., the Wolff competition should not make the situation much more serious.

"We are anticipating putting in another price reduction some time soon, and feel that on account of our large production we are in a pretty strong position.

"You have probably noted from some of the recent Board reports that we are building at Old Hickory a new plant of 8 machines, exactly doubling the present Buffalo production.

4468 We feel that our large output will give us a cheaper cost than our competitors can obtain for several years, and we hope that by consistently lowering our prices we can keep them from expanding too much."

The Government offers in evidence Exhibit 1452, the first sheet of which reads: "Cross Reference Record," dated March 27, 1930.

(Cross Reference Record dated March 27, 1930 and attachments were received in evidence and marked "Government's Exhibit No. 1452.")

Mr. TUBRIDY. It states:

"Mr. Bernheim's letter to Du Pont Cellophane Company, reporting on the meeting of Kalle & Company, Wolff & Company and La Cellophane, which took place at Koln on March 25th and 26th, which meeting was for the purpose of settling the world's agreement regarding the sale of Cellophane. Letter contains particularly information about Wolff & Company.

"April 10, 1930: Reply by Mr. May. Also further correspondence."

The attached letter from Mr. Bernheim to Du Pont Cellophane Company dated March 27, 1930, reads:

"We met the representatives of Kalle & Co. and Messrs. Wolff of Walsrode, at Koln on the 25th and 26th inst. to try to settle the world's agreement regarding the sale of Cellophane, agreement which was not to include the states of north of Panama canal.

4469 "As it was to be anticipated, the discussion with Messrs. Wolff (Mr. Wolff's son) was very difficult and came to a complete break on the 25th inst. but the conversations were resumed again with the help of Kalle & Co. on the 26th inst.

"The present proposals of Wolff to us were not acceptable and we explained what our best figures would be. We expect an answer from them within 8 or 10 days and we will let you know of the result of these negotiations as soon as we have some interesting report.

"Mr. Wolff stated that he has 3 machines at Walsrode and declared that each machine can actually produce 1,000 kilos a day and he added that it is a fact that he can prove.

"We had some conversation with Kalle & Co. regarding the waterproofing process; we heard that Wolff's patent was very nearly the same text than your own patent. You therefore have been working on the same line, getting the same result and taking a very similar patent but, your patent has been taken about 8 days before Wolff's patent and therefore the latter is invalid.

"Under these circumstances we took profit of our conversation with Wolff yesterday with regards to the States and possible de-

velopment of Cellophane in your country, to explain that your likely future policy would be to fight with ordinary cellophane and make your profit on the waterproofing cellophane and also
4470 that you would fight before Court any importers of waterproofed cellophane made with the nitro-cellulose process, or any one trying to manufacture in the States by this process.

"To this Mr. Wolff answered that he had under consideration at the present time a new process, very different to the nitro-cellulose process and also much superior, he further told me of his great disappointment on the negotiations he had with the Schenandoa people.

"He said that he has worked out a new design of Transparit machine, relying on a production of 2,000 kilos a day instead of 1,000 kilos and he expressed the opinion that—in front of the failure of his negotiations with the Schenandoa group—he would very much desire to negotiate with the Du Pont Cellophane Company. Any arrangement which he could find with you would be of great help to him, as his position in Germany seems to be rather bad. His sales for 1929 have been only of 388,000 kilos so you can imagine what his cost-price will have been and as his sales-price was only satisfactory for his sales in Germany where he is working in agreement with Kalle & Co. for a quota of 18% of the German market, we can assume that he has been losing money on his production, or at least on all his exported production.

"He further explained that the bankers of the Schenandoa are very wealthy people, and these negotiations have costed him
4471 a lot of time and money. He had to prove the existence and the validity of his patents and the American technicians staid at his mill for more than 4 weeks.

"He proved to them the possibility to make 1,000 kilos a day on one machine and every single affirmation he had made on the possibilities of his process. Therefore he considered that the negotiations would be successful as the terms had been agreed by the American group.

"The reason brought forward by the Schenandoa group for not signing the agreement was this summer stock-exchange collapse and financial situation.

"The conditions agreed by the Americans were a large sum of money in cash, an amount which was not indicated and 30% shares to be remitted to Wolff of Walsrode free of payment.

"We pointed out that no such conditions could be accepted by the Du Pont group even if his patents and processes were recognized by you, and Mr. Wolff frankly admitted that it was not in his intention to ask you anything like the above conditions.

"We are sending copy of this letter to Mr. Swint so as to hold him posted on these conversations.

"One of the arguments brought forward by Mr. Wolff when we discussed the figures for the sales quota compared with the production was that his waste is only 10%, maximum 11%, whereas Sidac, Kalle and ourselves declared that our waste is somewhere 20%."

4472 The Government offers in evidence Exhibit 1453, a letter from Mr. May to Mr. Bernheim, dated April 10, 1930.

(The letter from Mr. May to Mr. Bernheim, dated April 10, 1930 was received in evidence and marked "Government Exhibit No. 1453.")

Mr. TUTTLE. "We have your letter of March 27th reporting on your trip to Germany on the 25th and 26th of March and will await with interest the further news you expected to get eight or ten days from that date.

"In regard to our patent or moistureproof, our attorneys feel quite certain that a patent will be issued to us and are also cognizant of the fact that Wolff made application which we suspect he put in after receiving knowledge of applications made by us in other countries. We are very glad that you conveyed to Wolff the strong position we are determined to take in the defense of these patents, not only in this country, but elsewhere.

"What you say in regard to Wolff's new process is of considerable interest to us, since we can see a great advantage to us in controlling any patents or processes that would produce a product similar in characteristics to our moistureproof 'Cellophane'. If you can develop any further information as to what this process may be, whether or not it is patentable, and if so whether Wolff has made application, we would like to have the complete story.

4473 "Apparently the negotiations with the Skenandoa group have been terminated. This is welcome news in that my impression was that Wolff and Skenandoa had probably come to some final agreement. We do not see from our point of view any particular advantage of our making a tieup with Wolff on his non-moistureproof Transparit. How seriously do you take the statement that they have devoloped a new design of Transparit machine having a capacity of 2,000 kilos per day?

"As regards the matter of waste, our waste runs about 12% in cutting our original rolls to the form of what we call stock size sheets. After material is cut into stock size sheets, whether it would be Transparit or 'Cellophane', I would imagine that the waste would be the same in cutting these stock size sheets to special sizes. The waste in this operation varies considerably according to the particular sizes ordered and is consequently a difficult figure to deal with intelligently, except to say that our average waste in total, which would include putting into stock size sheets and from

the latter into sheets cut to special sizes, is 18%, which is not far from the figure mentioned as being the experience of La Cellophane, Sidac and Kalle."

The Government offers in evidence Exhibit 1454, a letter to Mr. Yerkes from Mr. Bernheim, dated the 16th of June, 1930.

4474 (The letter from Mr. Bernheim to Mr. Yerkes, dated June 16, 1930, was received in evidence and marked "Government Exhibit No. 1454.")

Mr. TUBRIDY (Reading):

"DEAR MR. YERKES: We acknowledge receipt of your lines of June 6th, and we were very interested by your price policy which seems to us a very clever one to adopt in the situation that the Sylvania Co. will probably start this month to manufacture their product and also that Wolff & Co. seem to negotiate again in your country.

"I saw Dr. Gerd Wolff, in Brussels last Friday.

"I told him that you could not send anyone over at the present time to see his process and that you suggested that we send somebody to his mill to make a report. He seemed astonished of your answer and suggested that he might send you the report made by the Schenandos technicians with regards to the production capacity of his machines which he states can produce 2 tons a day. I told him that I agreed that this might be a good course to adopt and I am wondering if he will send you this report directly.

"We have met with some serious difficulties last Friday in our meeting in Brussels with regards to the general agreements.

"The difficulties are arising from the S. I. D. A. C. people who are trying by every possible way to obtain a higher percent-

4475 age for their contingent. The speeches at a certain moment were very excited and looked like a break; it was decided after a certain time that a new meeting should take place in Brussels on the 2nd of July.

"We doubt the S. I. D. A. C. will insist on the position which they seem to have adopted because it might lead to a serious situation. We will of course hold you posted.

"The arrangements concluded with the S. I. D. A. C. are only partly executed; the participation and shares which we are to receive from them has not been remitted and we are insisting for this to be accomplished, but certain arrangements regarding territories have been made, for instances, at the present time we have actually abandoned to the S. I. D. A. C. the markets of Belgium and Holland.

"Some of our customers have written that they will not accept S. I. D. A. C.'s products because of the inferior quality. The

principal defect reproached to S. I. D. A. C. is that their sheets become milky after a certain time. In fact, in one or two cases, S. I. D. A. C. has been obliged to ask us for the delivery of Bezons or Nantes material because their customers would not accept anything else. Evidently the Sylvania Co. will make the same material with the same defects and, as they quality is such an important factor in your country, you will, in our opinion, have a very good position against the Wallack's group. Of course, we have taken every precaution to avoid the slightest indication to
4476 the S. I. D. A. C. how to regulate their manufacture so as to obtain a product similar to yours or ours.

"Mr. Brandenberger perfectly knows the mistake in which they are falling.

"With regards to waterproofing Cellophane we have nothing now to tell you except that when we came to the discussion on this product I stated that our arrangements to regulate the market in different counties did in no way mean a technic agreement or exchange of patents and I pointed out that this was specially touching waterproofing processes.

"From the test we have made of the S. I. D. A. C. Waterproofing products we are convinced that they are also simply using your patent."

The Government offers in evidence Exhibit 1455, a letter from Mr. Ewing to Mr. May dated September 11, 1930.

Government's Exhibit 1455

(The letter from Mr. Ewing to Mr. May dated September 11, 1930, was received in evidence and marked "Government Exhibit No. 1455.")

Mr. TUBRIDY. (Reading.) "Wolff & Company Walsrode.

"In accordance with request contained in your letter of August 15th, I took occasion last Tuesday to make a personal call on Dr. Gerd Wolff in Walsrode. In view of the delicate situation, I did not consider it policy to make a definite appointment at Walsrode, and therefore took a chance on finding Dr. Wolff at home.
4477 As I was in Berlin enroute to Cologne, I stopped over at Hannover and made the 35 mile journey northwest to Walsrode, thus making it appear to Dr. Wolff that the call was a casual one and not definitely planned. I was fortunate to find not only Dr. Wolff, but his sales manager, Georg Wilhelm Beneohr in Walsrode. The sales officer of Wolff & Co. is in Walsrode proper, but the plant is about five miles distant from the village. After explaining to Mr. Beneohr that Dr. Wolff had transmitted through Mr. Bernheim certain information on the capacity of his cellophane machines. I explained that I had only called in

order to obtain further information to amplify the description which did not seem to be complete. Mr. Beneohr suggested that I go to the plant and he accompanied me in a car. Dr. Wolff was in a very receptive mood, and after discussing his machines asked if I would like to visit the plant. I very clearly stated that if he was not fully protected and if the visit incurred any obligation, I would much prefer not to do so. He assured me, however, that the patent protection was complete and that there would be no obligation incurred in inspecting the cellophane plant as Mr. Crane and Mr. duPont had done in 1925; furthermore that the process was fully protected by patents which had been issued.

"Wolff & Co. are now operating two cellophane machines producing 1,000 kilos each of ordinary quality in 24 hours. Dr. Wolff showed me a third machine, which is capable of producing 1250 kilos. per day, but which is now idle because
4478 of the poor market condition in Germany and for export.

I find that Wolff & Co. have not constructed a machine for manufacturing 2,000 kilos. per day, but Dr. Wolff's engineers have assured him that they will be able to design and contract a machine on lines similar to those now operating which will produce 2,000 kilos., or 4400 lbs., of ordinary quality in 24 hours. This increase in capacity will be obtained by increasing the diameter of the casting wheel or by increasing the width of the wheel or by increasing the speed. The larger capacity machine therefore does not even exist on paper, and Dr. Wolff has no intention of building a machine unless a new plant is intended in the U. S. A. or elsewhere. To increase the capacity of the existing machines, excepting by increasing the speed, will be too costly a proposition.

"There are no patents on this high speed machine excepting those basic patents for the Wolff process. The viscose solution is cast on a cylinder about five feet in diameter, the surface of which is covered with a special alloy composition. The lower part of the wheel is immersed in the acid solution and the cellophane coagulates immediately on striking the acid surface of the wheel. It is then conveyed through the solution in the various baths and over the drying rolls.

"Dr. Wolff wanted to know if we were interested to work with
him in the U. S. as his studies indicated that only
4479 with his process can such a capacity as 2,000 kilos. per machine be obtained. I replied that I was not in a position to answer this question as I had only stopped by Walsrode enroute to London in order to obtain further information supplementing that already sent to Mr. Bernheim. Dr. Wolff stated frankly that he would be ready to sell the complete patents for the process, drawings for the machines and the complete machines themselves if we or others were interested.

"Dr. Wolff stated that he had several negotiations pending for the U. S. A., but had reached no agreement and in fact there was little indication that he would reach one. He is particularly annoyed at the high tariff and the low prices and is very favorably impressed with the firm position which the duPont Cellophane Co. has acquired in the United States. Mr. Beneohr told me that they were now selling very little in the U. S. A. and could not hope to compete.

"I asked Dr. Wolff what the situation was regarding waterproof quality, and he explained that they were trying to make a waterproof quality but that they were far from satisfied and were continuing their efforts. Mr. Beneohr ventured the information that Wolff & Co. had been working very amicably with Kalle & Co. for two years, and while they dealt with the same type of customers, their methods of manufacture were dissimilar.

4480 "After visiting the casting room, we made a hurried trip through the cutting and packing departments, which contained no outstanding features."

The Government offers in evidence Exhibit 1456, a letter from Mr. Jenney to Mr. Swint, dated June 27, 1929.

(The letter from Mr. Jenney to Mr. Swint, dated June 27, 1929, was received in evidence and marked "Government Exhibit No. 1456.")

Mr. TUBRIDY. (Reading.) "Dr. Sparre has picked up some confidential information that Wolff & Co. intend to build a plant for the manufacture of transparent sheeting in competition with cellophane. As you know, Wolff & Co. is financially controlled by the I. G. (80%) but the I. G. does not seem to have control of their actions in every way. Dr. Sparre's source of information explained this as being due to the fact that Wolff & Co. is a peculiar type of German stock company (Commandit A. G.).

"Dr. Sparre's source of information felt that it was quite likely that the I. G. have taken advantage of the apparent independence of Wolff & Co. to take up this manufacture in America because Kalle & Company cannot do it. Of course it will be a very difficult question to decide whether it is the I. G. or the minority interests in Wolff & Company who are responsible for this move. It occurs to me, however, that a little information as to the power

4481 in which a 20% minority might hold in a Commandit A. G. would serve a useful purpose in deciding whether the I. G. are playing square in this matter or not. I recall that either you or Mr. Ewing made quite a study of the different types of company organizations in Germany during the formation of the Ventube and Duco companies, so you no doubt already have the information that I desire."

The Government has already submitted the following documents in evidence appearing at transcript page 534, but I would like to offer two other documents, sir.

One is Exhibit 2569 which appears in book 22 at page 3376. The covering sheet is a letter from Mr. Hatt to Mr. Carpenter dated September 13, 1933, captioned, "Annual Statement and Balance Sheets Sylvania Industrial Corporation."

(The letter from Mr. Hatt to Mr. Carpenter, dated September 13, 1933, was received in evidence and marked "Government Exhibit No. 2569," together with attached documents.)

Mr. TUBRIDY. It reads, "At the request of Mr. B. M. May, I am enclosing herewith translation of the Profit & Loss statement and also the Assets & Liabilities statement of Sylvania Industrial Corporation, together with the comments of our Treasurer's Department and their analysis of the same.

"Thought you would find this of interest."

The Government submits all of the documents, but wishes
4482 to read only from the last page of the document, the middle paragraph, sir.

Mr. GESELL. Which paragraph?

Mr. TUBRIDY. The last page, the first full paragraph:

"This is the balance sheet as submitted by Sylvania to the S. I. D. A. C. who are their stockholders and for inclusion in the annual report of S. I. D. A. C. It is, therefore, authentic, and it has come into our hands by the European route."

4483 Mr. TUBRIDY. The Government offers in evidence Exhibit 2090, which appears in Book 15 at page 2199. This is a letter from Mr. Chase to Mr. Jenney dated February 2, 1940, captioned "Sidac—Moistureproof Patent License."

(Letter from Mr. Chase to Mr. Jenney dated February 2nd, 1940, was received in evidence and marked "Government's Exhibit No. 2090.")

Mr. TUBRIDY. It reads:

"Your letter of December 11th on the above subject was received on January 10th but, as you may have noted from our correspondence on sub-licenses, Mr. Bernheim was not available for most of the latter part of January. It is therefore only a short time ago that I had occasion of putting up to him the question of S. I. D. A. C. and the Moistureproof patent license.

"Mr. Bernheim told me in that connection that notification of the termination of that license seems to have taken the S. I. D. A. C. people entirely by surprise and they made quite a holler about it. They have since tried to demonstrate by correspondence that they are still legally entitled to a license of the moistureproof patent notwithstanding the termination of the commercial agreement, but, according to Mr. Bernheim, their argument does not stand

up and they have been told so. The latest news are that they will send a legal delegation to come and discuss the matter in Paris.

4484 "Incidentally and according to Mr. Bernheim, the heads of S. I. D. A. C. and more specially Baron Janssen are quite honest and responsible, but he spoke of one of the men in the organization and head of the responsible department in this special case, as being somewhat of a bandit and therefore most unreliable.

"For your information I had the impression that our friends of the Comptoir may not take, in connection with that special matter, as firm a stand as they would be entitled to according to their previous statements. The Comptoir Group always seemed to be very desirous, for some reason, of remaining in exceedingly good terms with the Solvay Group, possibly due to their interests in the French chemical industry. As I have just said, the statements in the first sentence of this paragraph is only based on an impression gathered in the course of my talk with Mr. Bernheim and is not based on any definite statement of his.

"I will anyway keep this matter in mind and bring it up again from time to time in the course of any future talks I may have with Mr. Bernheim."

That concludes this section by the Government.

Mr. GESELL. May I have just a moment, your Honor?

The COURT. Certainly.

Mr. GESELL. Well, your Honor, there are quite a number
4485 of different and in our minds somewhat disconnected topics involved in this group of documents. I am going to try to take each group up and discuss only what seems to be at this stage the significant new material because in large part we have gone over a lot of this ground before.

The first and the major part of these documents concerns the subject matter of the settlement of the Sidac controversy. They do not have anything to do, in our judgment, with any world cartel, but they have further to do with the working out of the Sidac controversy. You will recall that an employee of Sidac took technical information that he was not entitled to from La Cellophane and set up Sidac, and that La Cellophane by getting its shares in Sidac violated the contract with Du Pont.

In that schedule I have given you I think I have shown the inter-relation of the documents. The only point that I want to make is to point out at Exhibit 1401 on page 1811 and again in Exhibit 1410 the references to the stealing and the pirating of the technical information which was an issue we had up some time back and which is now clearly confirmed in the documents. I don't believe these documents add anything to the nature of the

controversy or throw any further light on how it was resolved when they are put into chronological relationship with the other pieces of paper that came in earlier.

4486 If we turn to Exhibit 1425, that is one that I would like to comment on briefly. That is a long memorandum from Mr. Chase regarding some conversations that Mr. Pickard had abroad, and the memorandum is in 1932 and begins at page 1870. There is considerable discussion of whether or not Du Pont would or should make a deal with a Japanese concern regarding the manufacture of cellophane. There is no evidence—and there will be no evidence because it didn't happen—that Du Pont ever did make any kind of an arrangement with the Japanese. And if it is offered for that purpose by the Government, the proof will fall far short of that. I think this is practically the only discussion of that episode.

In Exhibit 1426, which is the next exhibit, you will notice there the demonstration of the complete separation of Wolff and Kalle, there being no exchange of information of any kind between Kalle and Wolff, which means that Kalle, the licensee of La Cellophane and of Du Pont, was not transmitting, as indeed it had no contractual right to do, technical information to Wolff nor visiting the plants. And it is also clear that I. G. Farben, having a financial interest in Wolff, could not dictate its manufacturing or selling policies.

In discussing this document its pertinence was suggested by Mr. Pubridy as showing that this was all part of a general plan. Well, it not only shows the complete separation of Kalle and Wolff, but on the last page your Honor will see reference to a number

4487 of concerns which are not alleged to be co-conspirators, as to which there is no proof that they were involved in any arrangement or convention, abortive or otherwise, all of them making cellophane in different countries of Europe, with which Du Pont, as far as this evidence shows, had no relationships at all, factories at Prague and in Czechoslovakia and elsewhere on the continent.

The next is a group of documents beginning at 1428 and running to 1436, and that is a group of documents from C. I. L., in which C. I. L. was seeking Du Pont's assistance back in 1933, which your Honor will recall from the earlier exhibits was about the time it commenced the manufacture of cellophane—C. I. L. was seeking Du Pont's assistance to export outside of Canada to certain European markets. The evidence on this point is, in our judgment, crystal clear. Three documents which are not included with this group but which are dated at exactly the same time, 1154, 1156 and 1174, which we have already discussed, show that when C. I. L. took up the question with Du Pont as to whether or not it could

sell in France and in England. Mr. Yerkes, speaking for Du Pont at the meeting with the high officials of C. I. L., said, "As far as we are concerned you can sell, but we have a license arrangement and we cannot give you rights. You take it up with the French."

This is just more of the same episode, where they ask us whether we won't help, and the documents that Mr. Tubridy read show that we went to the French and urged them to see if
4488 they could not let C. I. L. sell.

Now, doesn't that conduct show, first of all, that we are recognizing our contractual license obligations and nothing more and that we are not participating in some plan to divide world markets? We are saying, "If you can get permission from the licensor who owns these rights, why go ahead and do it." And there is nothing in these documents which expand or change the situation shown by those earlier C. I. L. exhibits which we went over at great length earlier in the trial.

The next episode is one that constantly seems to crop up in these documents at different places, and I have yet to hear from the Government what the relevancy of it is. This, I think, is the third time—Exhibit 66 in 1933—that there is evidence offered to show that Du Pont had an opportunity to buy a substantial interest in or to buy control of its American competitor, Sylvania, and again the documents themselves show that we turned it down. And again the documents show that we couldn't do it; we couldn't even consider it because we would violate the anti-trust laws.

Now, I don't understand the issue. We had opportunity to buy up a competitor directly, with control stock or non-control stock, or indirectly through La Cellophane, and if we had been the monopolist they say we are, if we were trying to stifle competition, I would have thought that we would have
4489 taken up one of these opportunities, or we would have indulged, in some kind of roundabout way with La Cellophane, to have an interest in Sylvania's stock. And each time we said, "No, we can't under the anti-trust laws, and we are not going to do it."

That, I say, is affirmative proof of an absence of monopolistic intent. It is affirmative proof that we were seeking to abide by the laws that we are charged with violating. And again it is offered in great detail, and again it simply shows the same thing.

The COURT. We will take our luncheon recess at this point.

(At this point a recess was taken until 2:15 o'clock p. m. of this same day.)

4490 2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. GESELL. I had finished my comments, your Honor, on the question of the purchase of Sylvania shares.

The next two exhibits which I would like to deal with our 1442 and 1445, appearing at pages 1913 and 1919 of the documents. These are two documents written in 1938. I emphasize the date because it was a matter of about two years after that that amendments in the license agreements took place. These two documents in my judgment show conclusively that duPont never entered any kind of a world-wide cartel.

The COURT. What are their numbers?

Mr. GESELL. 1442 and 1445. Your Honor will recall that on the opening Mr. Minicus said we had a rather unique situation here; that we had a cartel within a cartel; that there was a world-wide arrangement to divide markets, and then inside that was the licensed cartel. These documents show in my judgment—and I am going to point out paragraphs in a moment to the Court—that the only commitment that duPont made was the commitment under its license agreements, which is the commitment which I have stated to your Honor we made at the time we entered
4491 into the business, and that we never entered into what Mr. May called the fancy European consortium and what Mr. Minicus calls the world cartel.

First, document 1442, which is Mr. Hatt informing Mr. Jenney of the Foreign Relations Department about the status of arrangements abroad. One would think that if there was some world cartel Mr. Jenney, the Assistant Director of the Foreign Relations Department, would have had some knowledge about it before 1938. You will note that Mr. Hatt says in the second paragraph that he has recently heard that they are discussing a world cartel in Europe, and the final determination was to make a cartel in all countries except the Western Hemisphere. Except the Western Hemisphere. Your Honor will recall other documents showing that non-licensees of La Cellophane were always free, such as Wolff, to sell into the United States. And then in the last paragraph on page 1913, "We would not be interested in making a definite cartel arrangement with them in South America," and the discussion of the prices. Well, if we were in an agreement by 1938 there would hardly still be a discussion about it, and here on the document is the clear showing that we were not a member of it, as he also emphasizes over in the next to the last paragraph on page 1914.

Then if you turn to 1445 I think you see the clearest demonstration of the distinction which we have maintained exists between a so-called license arrangement—between certain
4492 specific licensees and this world-wide consortium or world cartel that Mr. Tubridy like to speak about.

First of all, the letter on page 1919 points out there has been great difficulty in forming a cartel in Europe. This is 1938 and

they are having difficulty still, and I think the next to the last paragraph of Mr. Brandenberg's letter is of interest. He has pointed out that various governments are forcing their companies and their territories to branch out and sell for various political reasons, and so forth, and he says, "Under such conditions it is difficult to accomplish anything constructive on an export basis, since the effort put forth seldom brings back a commensurate profit, at least not more than for a very fleeting time"; and we have seen again and again in these exhibits these fleeting efforts of trying to bring about some arrangement, and constantly one European or another breaking the traces.

4493 If you will turn to page 1920, the second paragraph, he says that the European manufacturers are aware of these unstable prices and other conditions in the markets, and he says that in the hope of finding a remedy they have joined in an international convention, actuated by a sincere desire to stabilize prices in South America. Here they are reporting this to duPont in 1938, and the purpose of the convention, as stated, is to fix prices in South America, wholly unrelated to duPont, wholly unrelated to the United States market, and of course wholly unrelated to monopoly.

Then he says in the next paragraph, "In spite of our efforts * * * we were unable to bring the Convention to the necessary state of agreement * * *" And then skipping to the fifth paragraph on that page, you see reference to a large number of producers who are not under any arrangement abroad and who are therefore making it impossible for those who want to come together abroad with La Cellophane to reach any convention.

Then finally you come in Exhibit 1445, on page 1921, to the next to the last paragraph on that page where he says, "In view of the present situation we, like you, have concentrated our sales effort on moistureproof foil, but since we are always colliding with your low price we have not achieved the results we had expected." Price competition between Du Pont and La
4494 Cellophane in South America? Again negativing commercial agreements.

Then the last paragraph, I think, your Honor, is of particular importance on that page. He says, "It does not seem possible to stop competitors from selling their grade of moistureproof foil in South America as long as they are not manufacturing under our patents." And he points out that he has no control over anyone who is not a licensee under a patented invention.

Mr. Bernheim, in 1454, emphasizes again that distinction, that clear distinction, between the arrangements that La Cellophane has with licensees under specific patented inventions and processes

and the inability to accomplish commercial agreements with others and people other than Du Pont.

I think 1445 is of great significance in demonstrating the clear distinction between the so-called world cartel and the license agreements.

Look finally at the top of page 1922, your Honor: "If North American territory has been considered outside the International Convention, the reason is that every member is left free to follow the policy which seems best. Indeed, we have no means other than license contracts by which we can stop competitors from exporting their products to North America, because most of the process patents have become public property." In other words, the convention—you didn't join it, it didn't relate to North
4495 America, we haven't been able to get these people together anyway, there are always people busting over the traces, and our only control is in respect of the licensing under specific patented inventions. And who are the licensees? B. C. L. and Kalle and La Cellophane itself. That is the license agreement group.

And he says in 1938, at the end of all this palava we have been going through for days here in this courtroom, "We haven't any way we can stop people from selling into the United States except our licensees under the moistureproof patent, and the convention is not working, nobody is together, and you were never in it anyhow."

I submit there could be no clearer document considering its date and considering its author than this on the distinction between a license agreement limited to a few specific licensees, agreements that we would say were lawful and proper, and this amorphous charge of world-wide cartel.

If I may turn for a moment to another subject, let me deal with this question of Skenandoa. That relates to specific issues in this case and it is put forward by these documents. We have at 1452, and on the others in that group, documents discussing the possibility of Wolff, a German manufacturer of cellophane, who is not licensed under Du Pont's inventions, or La Cellophane's inventions, and who manufactures by an independent process, entering into arrangement with Skenandoa. And one of the
4496 charges that was thrashed out on pre-trial and that appears in these pleadings is the charge that Du Pont kept Skenandoa from engaging in the manufacture of cellophane. And here on the exhibits we see what the story really was, in 1452, that Mr. Wolff wanted an arrangement with Skenandoa. The exhibits have shown he was not a member of any cartel or any consortium or any arrangement with Du Pont, and he negotiated with Skenandoa, and that the negotiations failed, as it says on page 1938, and that he was put to a lot of time and trouble. And then

we have the reason. Is it cartel? Is it Du Pont intervention? Not at all. On page 1939 he says, "The reason brought forward by the Skenandoa group for not signing the agreement was this summer stock exchange collapse and financial situation," and here is a letter written in March, 1930, and he is referring to the stock exchange disaster of 1929. He had his deal. He was going forward. He was making arrangements with Skenandoa, a rayon manufacturer; the stock market collapsed, and the bankers were not willing to go forward.

Now, is that proof of exclusion of competitors by duPont? There is nothing to indicate that duPont intervened in the negotiations, that it took any steps to stop it, and it is clear that the economic circumstance of the stock market crash was the cause.

Then Wolff came to us and said he would like a deal, wouldn't we buy his process. He couldn't sell over this
4497 tariff wall. He is very disturbed about it, he says. Well, indeed he should be. Congress intended that should be a prohibitive tariff, and it was. And wouldn't we buy his process? And we didn't buy his process, a competing independent process, which, if we had been a monopolist pulling in all these processes to ourselves we would have bought. We didn't buy it.

4498 So that I say these documents negative another essential allegation of the Government's complaint.

Now, the only documents I have not considered, your Honor, are scattered documents through here concerned with prices. I think in all there are four or five documents concerned with price reductions and the competitive effect of price reductions. We are coming to a section of the case which deals with the defendant's pricing and price policies, and with respect to those documents I prefer to discuss them in the context of the evidence when we know what the policy was and how it was operating and can relate these specific reductions first of all to the tariff, and second, to the general policy of the company.

Mr. Timmony. If your Honor please, I would like to call your Honor's attention, first, to these companies with whom duPont had explicit and definite arrangements: Kalle, La Cellophane, later British Cellophane, and then Canadian Industries, Limited.

Now, who were the companies that dominated and ran the cellophane field? La Cellophane and Kalle and duPont. If we look at the time when this original convention was functioning, sir, who is left outside of that? Wolff is one and Sidac the other. What is the arrangement between Wolff and Kalle? What is the arrangement between I. G. Farbenindustrie, Wolff, and Kalle?

4499 duPont doubted that I. G. did not have complete control over Wolff. It says so in their own letters. We can't ex-

pect to find documents defining exactly what the relationships were between these parties. We are happy to get what documents we can to show there is a relationship. Every time we run into something like a cancellation of an agreement do we find it in a paper? No. They send an emissary to Europe to negotiate and find out how the cancellation was carried out. Only 10% of this is in writing.

Who is Sidac? It is the only other company at this particular time with the early convention outside of this agreement, and, as indicated, they worked along with La Cellophane. We presented the document showing the world was divided into territories. A map was handed to your Honor showing how the world was divided up, and on that map it says, "duPont's territory, North America."

Mr. GESELL. No. It says, "Free territory."

Mr. TUBRIDY. duPont.

Mr. GESELL. Free territory.

Mr. TUBRIDY. I make my interpretation.

Mr. GESELL. I must rise, your Honor, with respect to a statement of such materiality as that.

The COURT. Just a minute, gentlemen.

Mr. GESELL. I am sorry.

The COURT. I just want to refresh your recollection. The map is not in evidence.

4500 Mr. TUBRIDY. I realize that, sir.

The COURT. So why should I give it any consideration?

Mr. TUBRIDY. Very well, but there is the statement of counsel on the other side. I can comment on statements of counsel on the other side.

The COURT. Suppose you refrain from making comment on a document that is not in evidence, then Mr. Gesell won't articulate any objection, I suppose.

Mr. TUBRIDY. Very well, sir. I shall refer to the document—I forget the number immediately, but I can call it to your Honor's attention—on which occasion this map was handed up and in which duPont's territory was defined in that document.

The COURT. That is right.

Mr. GESELL. No. 1022.

Mr. TUBRIDY. Which is the same thing, sir.

So that we have a situation where they have definition of territory. La Cellophane speaking for duPont on all occasions, representing them throughout, and what is this important document that Mr. Gesell has reference to that is so important to indicate that there was no cartel in 1938? 1442.

The COURT. Was that last allusion to 1022?

Mr. GESELL. The one I referred to is No. 1022.

Mr. TURRIDY. I read the fourth paragraph, sir, of 1442. It says:

4501 "Their decision in the cartel was to leave South America as open territory, having no restrictions as to quota or the prices to be quoted. We would not be interested in making a definite cartel arrangement with them in South America, although they suggested that the other manufacturers would be willing to consider doing so with us if we would offer them a price differential of 5% in their favor in that country. We are not disposed to do this. In the first place, the French, who assumed originally to control world markets on this commodity, have given us equal rights with themselves. Obviously, they cannot give away any part of that market without infringing on these rights to us."

They don't have to sign membership card to be part of this cartel, sir. All they have to do is to conform with the directives that are sent out through La Cellophane as to whose territory each company is entitled to. We showed before they said they would not go into South America because they had not received their quota. What quota? The quota established by this world-wide cartel, and they could not move until they had received their quota. They were told to stay out of China. That was Kalle's territory. They stayed out of China. Every one of these specific agreements defined territory, limited duPont to North America with the right to sell on competitive terms in South America. Selling in competition in South America was part of the terms of the

4502 cartel arrangement. What do you need to prove a member was a part of a combination in restraint of trade anymore than the Government has shown in this case?

Mr. GESELL. That is the question——

Mr. TURRIDY. Precisely.

We showed your Honor the definite tie-up between duPont, La Cellophane, Kalle, British Cellophane, and a couple on the outside, the definite arrangement with Sidac and Wolff.

That is all I have to say, your Honor.

Mr. GESELL. To clarify this one point, your Honor, and terminate this discussion, 1022 refers to the United States as an open market without price agreement and states with respect to those that "Owing to the fact that duPont preferred not to join the convention we could not keep Wolff and Sidac away from your markets."

Mr. TURRIDY. I think we have commented on that before, your Honor, when that document first went in.

The COURT. Well, so ends Act 1; is that right?

Mr. TURRIDY. Yes, sir.

The COURT. You have finished Section 2?

Mr. TURRENTINE. Not completely, sir.

The COURT. Oh, I understand——

Mr. TURRENTINE. Well, let me explain. There is a difference of opinion on whether objections to our documents should be heard at this time with regard to hearsay objections, and Mr. Gesell is still retaining his objections.

4503 Mr. GESELL. I would be glad to argue it now.

The COURT. Let me see if I can take inventory as to where we stand.

No. 1, the question arose as to whether we should pass on the admissibility of any particular item as it was introduced. We all agreed we would not follow that procedure as it would tend to slow up the trial.

No. 2 was whether we should pass on the admissibility of any particular document or group of documents against which objection was made at the end of a particular section of the Government's case.

No. 3, there had been some discussion, without arriving at any conclusion, however, that there was a possibility it might be better to await all discussion of the admissibility of evidence where there was objection taken until all the case was in, at which time those objections were to be argued wholly and then after that any motions that were made by the defense as to dismissal or for judgment would be heard.

Now, I don't recall—and refresh my recollection—whether we had arrived at any definite conclusion as to the modus operandi, whether it would be one, two, or three.

Mr. MINICUS. May I refresh the Court's recollection?

The COURT. Yes.

Mr. MINICUS. Appearing on page 248 of the transcript, Mr. Gesell speaking:

4504 "My suggestion to the Court would be that we proceed with the discussion of this first group of documents"—there I understood him to mean the foreign section—"letting them come into evidence subject to the objections which we have noted formally in the record, with the idea that after the entire group is in, in accordance with the suggestion your Honor made the other day, we can take up materiality, relevance and hearsay on these documents by a group. But letting them come in and be discussed, we of course are not waiving the objections that we have noted, and we can put those up at the end of this section of the case.

"The COURT. All right, for the purposes of the record the Court recognizes the reservation made by Mr. Gesell and it should be noted on the record."

That is the understanding, your Honor, that the plaintiff has proceeded on up to this point. We feel that sometime before we go on too much further we should have a definite understanding about the status of the documents we have offered rather than let them entirely pile up to the end of the case.

The COURT. I understand from the point of view of an advocate you want certainty and definiteness and the absence of further worry on any particular item you might have. I am approaching the problem from the point of view of the Judge, and I don't know which procedure would be better.

4505 For example, there has been reference here this afternoon that comments will not be made on certain documents that have been offered because later they will come up in another category of the case.

My point is this, and you are in a position to tell me this information: Are the documents which are subject to objection of such quantity and nature that they will be helpful if I postpone ruling on them until I see Act 2 of the case?

Mr. MINICUS. In my opinion, definitely not, your Honor.

The COURT. They have no relation to any other matter?

Mr. MINICUS. No, sir.

The COURT. Then I am ready to pass on them whenever you are.

Mr. GESELL. I will argue them now, your Honor.

The COURT. Yes.

Mr. GESELL. Owing to the fact, your Honor, that a number of the documents which were in the plaintiff's case were not offered in this group, and as to some documents we did work out the question of their admissibility as we went along, we have been able in the light of the Government's comments to review our objections, and they are now limited to a group which I have here on a list which I would like to have copied into the transcript, and I have handed a copy to the Gov-

4506 ernment. I will hand two copies to the Court of the specific documents as to which we are taking objections.

1016	1147	1201	1394
1024	1154	1211	1401
1038	1165	1216	1405
1044	1167	1218	1406
1045	1172	1224	1408
1076	1174	1228	1412
1083	1176	1229	1414
1111	1181	1231	1418
1126	1185	1240	1441
1138	1188	1266	2055
1139	1196	1287	

These documents, if your Honor please, are all documents written by people who were not officials or directors of duPont, and they were not written by duPont. Our objection to all of them is the same. It is the objection that they are hearsay.

4507 I want to see if I can make the nature of our position as to these documents clear. There are many documents that have originated with people abroad to which we are not taking objection.

The COURT. At this point hand me one typical. Start with 1016 and let me see what it looks like.

Mr. GESSEL. May I ask your Honor to look at 1418.

The COURT. Yes, sir.

Mr. GESELL. Now, there are many documents to which we have not taken objection that originate with people abroad, your Honor. Those are documents that concern, at least to some degree, the operation of the formal contracts between duPont and certain parties, and as to those documents we fell that under the more liberal interpreations of the rules of evidence they come in. We are not of course admitting that any of the alleged co-conspirators are co-conspirators, that we were party with any of them to an illegal combination or conspiracy of any kind. The objection that we are taking to this series is that it is a group which seems to us so remote from any proven combination or conspiracy as to be clearly hearsay and not subject to the co-conspirator hearsay exception. Our view of the law, I think, is a view with which the Government and the Court will not take issue.

The COURT. I don't take issue with either side.

4508 Mr. GESELL. It is simply this. I think we have got a question of fact, not a question of law before us. But as I understand the law, a statement made by a co-conspirator in the course of the conspiracy that furthers the objects of the conspiracy is admissible.

The COURT. Only after the corpus delicti has been shown.

Mr. GESELL. Provided that by independent proof aliunde a combination has been proven. We are not going to argue that the independent proof must show an illegal combination. Your Honor has recognized the Hitchman case in the Vehicular decision, and we say the combination may be a lawful combination, and the admissions of the parties to that combination come in if they are in furtherance of that combination.

So I think we are on ground where we are down to a very specific issue of fact that the Court will have to determine here on the basis of all of the evidence.

It is clear that statements made after a combination terminated by an alleged co-conspirator are not admissible, and of course it is also clear that documents such as the one I have shown you, a

mere narrative or gossipy kind of document, that does not further any object, cannot be said to be in furtherance of the object of the conspiracy and come under the hearsay rule.

The COURT. As far as this exhibit goes, I do not even
4509 know who the gentleman is they are talking about because his identity is not even disclosed. I quote, "I happened to meet somebody in Switzerland."

Mr. GESELL. "And he told me so and so."

The COURT. The quotes go on, "This gentleman did not know * * *" et cetera. Do you want to stop on each of these items?

Mr. GESELL. I was not intending to argue each specific exhibit unless the Court wished.

The COURT. Whatever counsel's preference is.

Mr. GESELL. My purpose was to outline our position, and I assume that the Government may want to take these up in some detail, but ultimately we have a pretty complicated question of fact that can be determined I think only in the light of all the evidence. I must say to your Honor there are other documents coming in in this case which are written by these same alleged co-conspirators. There are not many of them, but there are some coming along that are not in yet that will throw some light on the question of whether or not these objections have merit.

Mr. TUBRIDY. You asked Mr. Gesell, your Honor, if he would like to take these up one by one. We would like to take them up one by one, starting with the first one they have objected to and going down the list. He has his preference. You merely asked Mr. Gesell his preference.

The COURT. I had not finished asking him yet.

4510 Mr. TUBRIDY. I realize, but we are not in unanimity.

Mr. GESELL. I don't care how they want to argue their case.

The COURT. As I understand your position, you want to uninterruptedly, I suppose——

Mr. GESELL. Yes, except from the Court. I would like interruptions from the Court.

The COURT. ——argue your case on these exhibits, and then you say the other side may be heard, and whether the Court wants to take them up at that point and rule on them seriatim or study your argument and then rule on them, you have no preference?

Mr. GESELL. It makes no difference, whatever the Court wishes.

The COURT. I think I have your position and I have Mr. Tubridy's position. Now, I would like, since we are dealing with a group of documents, to hear argument in toto with respect to all of them first.

Mr. GESELL. I think I was saying that we come down to a question of fact.

The COURT. I would just like to suggest something to Mr. Tubridy. Mr. Tubridy, you understand that when you come to address yourself to these exhibits, either now or whenever
4511 you want, you can deal with them seriatim if you want and direct your fire at each of them as an isolated instance, as to why you think it should be retained in the case in support of your proof. In other words, I do not care what technique you select to support your view.

Mr. TUBRIDY. I would prefer to have Mr. Gesell finish his whole argument and then let me make mine.

The COURT. Fine. We are in agreement, I think.

Mr. GESELL. I was saying that really we have an issue of fact, and we have two so-called divisions of world markets alleged and claimed here by the Government, this world cartel and the agreement cartel, or what Mr. Minieus called in the transcript the concept of a double cartel, or a cartel within a cartel. I do not know whether perhaps we have three alleged cartels because there is a separate combination alleged as to caps and bands, which has different parties, different subject matter, and a different set of facts.

For our purposes we recognize the existence of certain foreign agreements. They are the license agreements in cellophane between Du Pont, C. I. L., B. C. L., La Cellophane and Kalle. The Court ultimately must determine whether these agreements are lawful in their context. And as far as these officials abroad of different companies who were licensees, during the time they were licensees made statements interpreting those agreements, discussing how those agreements should operate, we have not ob-
4512 jected to those statements. We feel they should come in. And the Court must consider them in judging whether or not what the Government calls the agreement cartel was proper or improper.

Your Honor has said you do not want me to argue National Lead and the other cases now, but your Honor is certainly aware that our position is that those were lawful agreements involving appropriately the licensing of inventions in connection with this joint venture. So what these objections are directed to is not the license agreements which are before the Court, but they are addressed to this so-called world-wide cartel apart from the agreements, the fancy European consortium that we were talking about a minute ago. We say as to that, your Honor, that the Government has not proven that duPont was a member of any such cartel. It has not proven what the objects of that cartel were. In fact, it has not identified the members and shown us when they joined. Was Sidac a member of it or wasn't it? We cannot judge the exhibits until we know. It is not alleged to be a co-conspirator.

But was it a member or wasn't it? We cannot judge the exhibits until we know. It is not alleged to be a co-conspirator. But was it a member or wasn't it? Was Wolff a member? Was the Comptoir a member? There is no allegation in this complaint that the Comptoir was a co-conspirator, but as I heard the talk it sounded as though the Government thought they were.

Well, who is the Comptoir? Is it a corporation? Who owns its stock? Who are its officers? We don't know. Is British
4513 and Italian Sidac a member of this cartel, this world cartel, or not? Or are they members of the license cartel? Because some licenses were put in. Is Sylvania here in the United States a member or not a member? What about I. G.? They are not alleged to be a member, and yet as I heard Mr. Tubridy talk, he talks a great deal about I. G. We have a document here written by an I. G. official. Is that a statement of a co-conspirator in furtherance of the conspiracy? If it is, who vouched them in, and by what independent proof aliunde are they shown to be a member? What about Courtaulds? They are not alleged to be a co-conspirator. The talk sounded as though they were. Where is the independent proof? And so it goes.

This is an amorphous general charge, in my judgment, built up from chit chat paragraphs taken from these various letters, written by this foreign group, who were not officers or directors of duPont, and those hearsay statements we say cannot come in against us here in the absence of independent proof aliunde as to the existence of the combination, and what its objects were and what its scope was.

This is not the time to review all the documents as to what the proof shows, but your Honor is certainly aware of much evidence that shows we were not members of any foreign arrangement apart from the license agreements. We have 1022 that we talked about a moment ago where the architect of this arrangement
4514 said, we are not a member, written contemporaneously with the supposed organization of it. We have our refusal to follow quota and price arrangements. We have Brandenberger's letter that I talked about a moment ago, 1445, showing the clear distinction between the two types of agreements. We have scores of documents that say that the arrangement never worked, whatever it was, and documents showing that it did not relate to the United States. So there is substantial evidence negativing the existence of a combination apart from the actual license agreements.

As far as the objects are concerned, I am equally confused as to what the situation is. Was one of the objects to buy up Sylvania? We have a lot of documents about this from the foreigners. In furtherance of what combination were those statements made?

We always refused to do it. We did not buy them up. We never came to any meetings of mind. And I don't know again what the independent proof aliunde is. And you could go on this way endlessly.

I think your Honor is certainly aware that this co-conspirator doctrine is one that must be applied cautiously. The Supreme Court has given clear instructions as to that in the Krulewitch case. And here we have a bunch of letters written by people who are unavailable as witnesses, translated from another language, often clumsily, written in the context of different continental laws and customs, and I say that before documents of that kind can
4515 be brought into the case and given any weight there must be a clear showing and a definite showing by independent proof of a combination. And the only combination that has been shown is the license agreements that existed between Du Pont, C. I. L., B. C. L., La Cellophane and Kalle. And those of course we ultimately hope to be able to show to the Court were lawful and proper agreements.

Finally I leave this suggestion with the Court. As Mr. Tubridy gets up to reach each of these documents and call attention to a sentence here or a phrase there, the question is not what those documents said. The question is one that he will not be addressing himself to, what is the independent proof aliunde that those statements were in furtherance of a combination or conspiracy which has been independently established by competent proof? We have had many statements here as to who these companies are, as to who owns stock in them. There is no proof as to most of that. We have statements that they are the largest, the biggest, and the most important manufacturers, and the only manufacturers, and there is proof that there are others, and there is no proof of the relative size or importance of them. But if the proof is looked at, it will be seen that there is no independent proof aliunde.

Mr. TUBRIDY. The first document that I request your Honor to look at is 1016, which is objected to. It is in Book 8.

The COURT. Yes, sir.

* * * * * *

4531 *2 (a) nd trial memorandum*

LEAHY, Chief Judge.

Under the II section of the Government's case—Defendant's Foreign Relations—defendant duPont has objected to 43 exhibits which have been introduced in evidence and has moved to strike these exhibits on the ground, in general, that there must first be a showing of a combination or conspiracy and until this is proven the Court should be alert to exclude hearsay. DuPont argues, in

short, that in the absence of independent proof the statements contained in the challenged exhibits can not be used. A particularization of defendant's argument in support of its motion and the argument of the Government that a conspiracy has already, in law and in fact, been proven, are recorded in the Transcript.

In disposing of the present motion to strike, I have relied, in part, on Judge Wyzanski's decision in United States v. United Shoe Mach. Corp., D.C. Mass., 89 F. Supp. 349. The legal
4535 questions involved have recently been discussed in 64 Har. L. R. p. 340 (Dec. 1950).

In ruling on the motion to strike I am merely determining, at this time, the relevancy and admissibility of the documentary proofs. I am not passing on the weight to be given to any particular document, nor do I wish this particular ruling to be interpreted as an indication of either total or lack of proof of one of the main issues. Additional arguments should be aimed at the merits of the charge and will undoubtedly arise later.

For my present purposes, then, I am making the following decision on defendant duPont's motion to strike. The decision is:

GX

1126	Granted.		1024	Denied.	
1147	Granted.		1038	Denied.	
1394	Granted.		1044	Denied.	
1405	Granted.		1045	Denied.	
1406	Granted.		1076	Denied.	
1418	Granted.				
4536	1083	Denied.	1196	Denied.	
	1111	Denied.	1201	Denied.	
1138	Denied.		1211	Denied.	
1139	Denied.		1216	Denied.	
1154	Denied.		1218	Denied.	
1165	Denied.		1224	Denied.	
1167	Denied.		1228	Denied.	
1172	Denied.		1229	Denied.	
1174	Denied.		1231	Denied.	
1176	Denied.		1240	Denied.	
1181	Denied.		1266	Denied.	
1185	Denied.		1287	Denied.	
1188	Denied.				
4537	1404	Denied.	1441	Denied.	
	1408	Denied.	1454	Denied.	
1412	Denied.		2055	Denied.	
1414	Denied.				

Defendant duPont has withdrawn its motion as to 1016.

Dated February 8, 1951.

Offers in evidence

Mr. GESELL. Your Honor, in respect to Exhibit 1414, which is one of the exhibits involved in this motion that your Honor has

just decided, a question has arisen several times at to who Dr. Carl Lissman is and who Mr. Maucomble is, two people shown to be present at the meeting, but not signing the document.

I have made inquiries overnight and I am informed by the du-Pont Foreign Relations Department that Dr. Carl Lissman is a General Manager of Kalle & Company and that Mr. Mau-
4538 comble is a representative of La Cellophane. They apparently were additional officials of two of the signing companies.

Mr. MINICUS. I realize that your Honor to this point has had a great deal of recourse to the index preceding the main index of our exhibits, and we will continue to pursue that procedure with one—not qualification, but more in the sense of expansion through recourse to the trial brief. If your Honor will observe Section I of the index you will note that the subject matter there is set forth in quite broad categories. One of the purposes of submitting a trial brief in this case was to make available a greater detail of breakdown for your Honor's convenience in following the evidence, and from this point forward we will have recourse to the brief. That procedure was not followed so much in the foreign section because the breakdown there was quite detailed.

This morning with reference to the trial brief we are starting with I, and at the preliminary stages will very briefly cover points 1, 2 and 3 under Roman numeral I. That is the description of the defendant and the co-conspirators, the products involved, and the nature of the trade and commerce in cellophane and caps and bands.

(Discusion off the record.)

4539 Mr. MINICUS. Do you have a copy of the trial brief?

The COURT. I do, sir.

Mr. MINICUS. We have reached a stage in this procedure, your Honor, at which that which was passed has become prologue. For a moment our efforts will be diverted to tying in what has gone before with this picture of the defendant's position in the industry at which we have now arrived.

Up to this point we have explored many devious channels of international negotiation. The problem now presented to us is, Where does all this lead?

We have told the Court that our case is framed entirely within the confines of Section 2 of the Sherman Act and to this point it sounded as though we have been attempting to prove a Section 1 violation through the extensive proof reading on these alleged conspiracies. And I would like to tie that in at the present time.

Prefatory to doing that, I would like to point out that there may be some misapprehension about our purposes in all this foreign material in light of what was said yesterday. We are not

here to prove particularly that the duPont Company was an enrolled, inscribed member of any particular cartel in Europe. That is not our major purpose. The Court very early in this trial was presented with alternative positions by the Government. One is
that by virtue of its predominant position in this industry
4540 and the monopoly powers attendant upon that position, that that fact alone was sufficient to bring it within the peripheral scope of Section 2 of the Sherman Act providing one thing was done. That one thing would be the negation on somebody's part, either the plaintiff or the defendant, of the fact that this defendant was a passive beneficiary of a monopoly. To a large degree that is where our proof on the foreign relations of the duPont Company has been directed—

The COURT. Well, I am glad you are opening this way this morning because frankly when I finished last night's session I took inventory, having nothing else to do as I was driving home, and I was trying to square all this conspiracy business with Mr. Renninger's statement where he said, "We stand on the Aluminum case," and I was not familiar with any conspiracy charges in the Aluminum case as decided by Judge Hand. Now, you can feel free and at liberty to elaborate and explain for me just how the conspiracy segment of the evidence fits into your picture. As I understand it, you say that as a result of those actions, not regarding them perhaps as an integral part of your charge, you say and correct me if I am wrong—that the result of these activities increased, even percentagewise, the monopoly that you charge?

Mr. MINICUS. Most certainly. That I am going to deal with at length here this morning.

The COURT. What was that phrase you used here, a
4541 passive——

Mr. MINICUS. Passive beneficiary of a monopoly. And that of course is only our first position. As I understand the cases under that, particularly the Aluminum case, the Paramount case and the American Tobacco case, at a certain point of power in the market place you have proved enough—that is what Judge Learned Hand said—having proved that position, the plaintiff has proven enough.

The COURT. But those cases were not involved with conspiratorial conduct.

Mr. MINICUS. There was some in the Aluminum case in connection with the Aluminum Company in Canada.

The COURT. Well, it was a minor motif. It didn't have the broad range of an international cartel——

Mr. MINICUS. That is true, your Honor.

The COURT. That we have been hearing about for a month.

Mr. MINICUS. I would like to point out in that regard that we have a factor here that Judge Learned Hand did not have to work with in his case, that is, there were importations of aluminum. Here we claim that they are are not significant enough to at all influence the supply in our domestic markets. It is an additional fact.

Now, the structure of the evidence on foreign relations
4542 has been gone into at great length and it is not my purpose to regapitulate, I would like to point our position out very briefly, very succinctly, in that everything stems from this 1923 agreement—there were three of them—between Du Pont and La Cellophane. It is the plaintiff's contention that that was nothing more than a bare, naked trade agreement, dividing world markets, both as they existed then and with provisions to take care of the future.

There has been attempted justification on that ground. The justification, it seems to us, has varied and fluctuated at different times and different places, but the justifications of minority stock holdings, joint ventures, tariff walls, patents, secret processes, even if they were actually there, we feel can have no effect upon the conspiratorial character of that agreement. We feel that since the Addyson Pipe case, any division of territories of that nature is unjustifiable, and we think——

The COURT. Division plus price fixing?

Mr. MINICUS. Division alone. We believe that the decision of the Addyson Pipe case has held that division of territories by itself is another per se violation of the anti-trust law, just as price fixing is a per se violation of the anti-trust law, and we believe that Judge Learned Hand in his opinion in the Alcoa case, where he is discussing per se violations of Section 1 of the Sherman Act specifically points out price fixing as one, I believe
4543 division of territories as another, and he intimates that boycott of the nature found under the Fashion Originators Guild is a third per se violation, beyond any possibility of justification. And we think that doctrine has resulted in Judge Rifkind's opinion in the National Lead case, which was affirmed by the Supreme Court.

Then growing out of that agreement, of course, we have shown all of these ancillary, auxiliary agreements that were provided for with tremendous foresight in that 1923 agreement. The parties that were party to that agreement said, "Now, there are apt to be other people coming along and we have to take care of them." And the other agreements followed in course with the named co-conspirators.

Of course, as it has been presented to us by counsel for the defense, those ancillary agreements following after were the natural

result of that agreement of 1923, and they had to come from it. They were based on it. We of course have not had an explanation yet of why when the 1923 agreement collapsed through the unilateral cancellation by the Du Pont Company, the 1935 agreement with British Cellophane Limited stood there and continued to stand there until after this complaint was filed. After the cellar fell in the roof stood up.

4544 Now, there we have that group of named co-conspirators. We feel that there are many things in that group that bring it under the category that is often loosely classed as "cartel," but I don't think it is necessary to decide what we are going to call it. It was world-wide collaboration, world-wide allocation of territories, world-wide division of markets. Beyond that we have pointed out that another cartel existed, and the defense has gone on at great length to show that duPont was not initiated, did not pay dues, did no have an enrolled——

The COURT. Membership card.

Mr. MINERS. An engraved membership card. We admit all that. We don't say they went to monthly meetings and were voted present. We think that some of their representatives sat in on some of the meetings, but we do say that through the entente formed in that 1923 agreement duPont at all times had an alter ego sitting in the cartels, whichever they were, in Europe and representing its interests there, and that alter ego was La Cellophane. We say that, and that is why we have put in all these documents which showed duPont sending information to La Cellophane and La Cellophane using that information for whatever purposes it might want in the activities of the cartel in Europe. It is inseparable. I don't see how it can be denied. I started out this discussion by saying I was going to tie this in with the picture of defendant's position in the industry. Where does it all

4545 lead? I think the answer is quite obvious. No imports for the markets of the United States of cellophane or caps and bands.

Before passing into a discussion of that I would like to point out that in the opinion of the Government there is another factor present here that is also an element in a monopoly case. If a monopoly case is a competent picture of constituent powers, we definitely have here a very great power. We conceive it as the power to control and regulate the foreign commerce of the United States. In 1923 two private organizations, citizens of different countries, but only citizens, sat down and signed for the corporations certain agreements. As a result of those agreements and the agreements and relationships that have flown out of them, we have seen that the American citizen, the duPont Company, has not in any substantial quantities ever exported any of its product

beyond the confines of the Western Hemisphere. We have also seen that there has been a complete absence of imported cellophane in our markets. The power to regulate foreign commerce of the United States under the Constitution is one that is usually accorded to the Legislature. But I submit to your Honor that very seldom has Congress ever done such an efficient job of stemming the ebb and flow of a product from the ports of this country or from the ports abroad to this country as effectively as these agreements have done.

I also invite your Honor's attention to an analogy between the ancillary agreements and reciprocal trade agreements.

4546 There were no reasons for these later agreements. La Cellophane was there. They could have licensed B. C. L.; they could have licensed Kalle, Viscose Development Limited. But they had to have a direct agreement with the duPont Company. Why?

Now I would like to turn our attention to this question of imports, because there we maintain is the greatest manifestation of these foreign relations upon the market equilibrium for these products in this country. What direct meaning with regard to our monopoly situation is demonstrable from these foreign relations? Simply stated it is no room for imports of cellophane or caps and bands in the market of the United States. No imports from La Cellophane, no imports from British Cellophane Limited, and no imports from Kalle, no imports from the other subsidiary of the formerly great I. G. Farbenindustrie, Wolff & Company, no imports from Canadian Industries Limited, no imports from any of the Sidac organizations, no imports of caps and bands from Viscose Development Limited or from Viscose Francaise.

The defendant has told us that quality and prices and tariff walls all resulted in this peculiarity in the market place, and yet the Government has shown that imports came in quite freely from Japan. Japan had to cross the same tariff walls. Japan was faced with the same problem of prices and quality. We have been told their quality was not as good; maybe it wasn't, but it

4547 came into this country and sold, and that was the only country industrywise that was not affected by any of these agreements.

At any rate, your Honor, I believe we can commence our monopoly investigation with the very basic premise: The quantities of imported cellophane and caps and bands available to purchasers in the United States have not been sufficient to significantly influence supplies available in domestic markets.

Our first consideration under the heading at which we have arrived, namely, the defendant's position in the industry, will be concerned with a description of the industry, the nature of its

products, and the participants therein. Attention has already been brought to Government's Exhibit 392 and Government Exhibit 1, and they are both at the present time admitted in evidence. I would however, inasmuch as all of Government Exhibit 392 had not been read—and I don't intend to read it now in its entirety—invite the Court's attention to certain portions of that exhibit that we at this time would like to present as a premise to factors that will be considered in the course of this monopoly development.

The first is that we believe that from Exhibit 392 it will be observed that from the start, from the very beginning of domestic manufacture in this country duPont possessed incontestable control of the operating subsidiary Du Pont Cellophane Company.

4548 Mr. GESELL. Did you say infinitesimal control?

Mr. MINICUS. No, incontestable.

Mr. GESELL. Oh, uncontestable.

Mr. MINICUS. Thank you, sir.

The support for that statement is found on the first page of Exhibit 392 which is page 5429 in the record of Government's Exhibits. I commence reading:

"The American Cellophane Company would be organized on the basis that the duPont Company would provide 52/60 of the capital required up to $1,000,000 and obtain 52% of the capital stock issued; while the French owners of the process would obtain 48% of the capital stock."

A second subject matter in this report that I would like to draw attention to concerns the fact that the duPont Company was even at this time, just prior to the signing of the 1923 agreement, was even then planning to exert whatever influence it was able to to secure an increase in the tariff rates for the purpose of driving American importers from the market. The basis for that is found in the report at page 5441. I commence reading:

"It cannot be said that the import duty gives a great deal of protection against importation from continental Europe with its greatly depreciated exchange. Some European countries have a

4549 decided advantage at the present time over this country in regard to labor and construction costs and the duty assessed up to this time of 20% ad valorem would be insufficient for satisfactory operation in this country. It is, however, probable that the Treasury Department could be made to assess duty on the basis of 40 cents per pound under paragraph 31, which would give a fair protection to the American manufacturer, though possibly not sufficient to maintain the present selling price."

I simply point that out at this time, without going into detail, as a predicate for material that will be brought in later. We want

to establish now that this thought was in their mind prior to their even having a company to manufacture cellophane in this country.

One other fact I would like to establish before we leave this memorandum, Government's Exhibit 392, for all time, is that the anticipated return on the investment, even before they had gone into the business, was in excess of 30% annually. That is found at page 5441 of the report.

The COURT. Touching on the commencement of the defendant's operations I wish I could have your position with respect to this one item: Do you think in this case there is any room for the defense of good faith?

Think about it and tell me sometime this afternoon. It is a loaded question.

Mr. MINICUS. I would like to consider that a little.

The COURT. Yes.

4550 Mr. MINICUS. There are a lot of ramifications to it.

The COURT. Exactly.

Mr. Minicus, I am not asking that as an advocate would ask it; I am asking as a Judge for help.

Mr. MINICUS. Yes, sir, I understand that, and it has occurred to me that while you are asking that question, your Honor, I went off on a tangent and never did get back to the original position I was making. I had presented our first alternative earlier in the discussion this morning; that is, position and power and necessity of negating the fact that they could not help themselves.

The COURT. That is what generated the line of thought.

Mr. MINICUS. Yes, sir. There is, of course, our other alternative position which may be a great deal easier of proof, and that is that not only is this position and these powers presently in existence, but they were acquired through active monopolization. If they were acquired through active monopolization—that is, if to achieve and maintain this position the defendant did certain acts designed to arrive at a certain end and some of those acts being illegal, and the defendant had knowledge that they were illegal, or others being the lawful means to achieve an illegal end, then I believe that your Honor's question concerning good faith is answered, because to actively monopolize through acts

4551 that at least in part are illegal acts and which the defendant knew to be illegal acts I think completely abrogates the concept of good faith. And, of course, we intend to prove both positions.

4552 Now, returning to this matter of anticipated return on investment. The return on the investment is actually seven per cent on the preferred stock issue of $600,000 and 33.7 per cent on the investment of $867,000 in common stock. This shows that

the preferred stock can be retired out of the earnings made during the first two years after which the remaining capital stock should show earnings in excess of 30 per cent. We will return to that point, too, at a later time——

Mr. Gesell. May I interpose a moment there. Does the Government contend that there was preferred stock issued? It is my information there was no preferred stock issued.

Mr. Minicus. We are contending nothing in this regard, your Honor, except to show the relative rate of return on their investment that they anticipated from entry into this business. We intend to show at a later date the degree to which this anticipated rate of return was achieved. We are not at this point particularly concerned with whether they issued any stock. We are only showing here a state of mind, the state of mind with which the defendant went into these negotiations.

Now, I have one other point to make before leaving this exhibit and that point appears at page 5455 of the exhibit and is addressed to the fact that at this early stage duPont's primary concern was with its exclusive possession of the markets for these prod-
4553 ucts. Commencing reading at the first full paragraph on page 5455:

"The writer is therefore compelled to take the position that the French interests are or were decidedly mistaken relative to important claims made for their cellophane proposition and their terms as stated in the option agreement should not be accepted without qualification. It is quite true that the value of the 'know-how' is exceedingly important. This in itself might be of sufficient importance so that it might be worthwhile to take a chance on the improbability of serious competition in this country. However, it does not appear to be good business for the duPont Company to pay the French interests $400,000, practically in cash, and risk a total of practically $1,500,000 (inclusive of above payment) in the manufacture of a new specialty product, the profitable returns on which justifying above payment are predicated on the practical absence of serious competition on the part of other manufacturers either in this country or other countries."

I would like to pause briefly on Government's Exhibit No. 1, which was also previously admitted in evidence, and merely point out—I am not going to read this exhibit—merely point out that it contains a brief summary of the company's history with regard to these products. It describes the reorganization of the Du Pont Cellophane Company, Inc., and the elimination of the French from
that company in 1929, and the eventual assumption of the
4554 operating company, the second Du Pont Cellophane Company, Inc., into the parent company in 1936.

In addition, Government's Exhibit No. 1 contains a brief description of the status of certain co-conspirators with relation to Du Pont's activities in regard to these products. The record of this trial as so far adduced completes that narrative.

* * * * * *

4569 Mr. MINICUS. The Government invites the Court's attention to Government Exhibit No. 67, which was introduced into evidence yesterday. The purpose of this is to describe the relationship of Mr. Janssen and Mr. Gillet and their holdings in the Sidac. It also serves to identify holders abroad of Sylvania stock, and inasmuch as the exhibit was read in its entirety yesterday I shall not reiterate that reading.

The Government offers in evidence Government Exhibit No. 68. This exhibit is simply designed to elaborate on the previous two exhibits, and therein is contained further discussion of foreign shareholdings in Sylvania. Government Exhibit 68 appears on page 212.

4570 (The letter from P. H. Chase to Mr. L. A. Yerkes, dated April 30, 1935, was received in evidence and marked "Government Exhibit No. 68.")

Mr. MINICUS. The Government offers into evidence Government Exhibit No. 70 at page 216. Government Exhibit No. 70 is a letter from Mr. J. E. Hatt to F. A. C. Wardenburg, London office of the duPont Company.

(The letter from Mr. Hatt to Mr. Wardenburg dated November 8, 1935, was received in evidence and marked "Government Exhibit No. 70.")

Mr. MINICUS. It reads:

"NOVEMBER 8, 1935.

"Mr. F. A. C. WARDENBURG,

"*E. I. duPont de Nemours & Co.*,

"*London Office.*

"SIDAC: This acknowledges your favor of October 30th, together with copy of Mr. Chase's letter from Paris.

"We thank you for the information, and as Sidac have recently sold their stock interest in Sylvania Industrial Corporation in America, correspondingly our interest in Sidac stock ownership will become more academic than previously. With the Solvay group in command of Sidac, we imagine their business activities will be carried on in somewhat different fashion than was the case under the old regime in Sidac.

4571 "However, there still remains in Europe a considerable block approximating 190,000 shares of Sylvania stock in the hands of Interchemic and we believe one of the Belgium banks—probably the one you mention—still holds a small amount

of this stock, but with the sale of Sidac stock in Sylvania now completed in America, probably the control of Sylvania is no longer European but rather held within the United States.

"We would be interested in a little further information as to Interchemic, as to what other interests they may have and who their directing heads may be—just as a matter of general information. We should not like to put you to any particular trouble to try to get this.

"With kind regards, I am

"Very truly yours,

"J. E. HATT."

One other things before passing from this preliminary section of the case I should like to mention, and that is the last paragraph of the complaint covering this section contains our allegations under interstate commerce, and interstate commerce is admitted by paragraph 20 of the answer and is not in dispute in this case.

There are two other exhibits of a routine nature, your Honor. The Government offers in evidence Government Exhibit No. 73, appearing at page 224, and the purpose of this exhibit is
4572 merely to indicate the date at which the American Viscose Company took over the Sylvania Corporation.

Mr. GESELL. With respect to that, your Honor, we want to press our authenticity objection unless the proposed agreement between American Viscose and Sylvania referred to in the first "whereas" paragraph is submitted with the minutes. If that is submitted we will have no objection.

Mr. MINICUS. We withdraw this exhibit and also the next one, your Honor.

Mr. GESELL. Does your Honor want to take a mid-morning recess before I start my comments?

The COURT. Yes. Recess for 10 minutes.

(At this point a brief recess was taken.)

Mr. GESELL. Since we are starting a new phase of the case, your Honor had the benefit of some remarks by Mr. Minicus as to the general relationship of this phase of the case to the earlier phases, and I want to deal with our position on two or three basic issues that are suggested by these documents in some detail, because I feel that if we pause now and focus the issues we can get through some of the remaining documents more rapidly.

Apparently the relation of the foreign aspects of the case to this domestic aspect of the case hinges principally around im-
4573 ports, and it is clear on the evidence that imports were not very substantial.

It seems to me the question posed is whether the imports were excluded from this market by reason of various foreign agreements that the Government alleges were made with some foreign

producers, or whether they were excluded by other factors; and I think that it is clear that the exclusion of the imports came about because of factors other than any agreements or arrangements that duPont had with La Cellophane.

Speaking generally, before turning specifically to the documents, it is our position that there was a prohibitive tariff; and, secondly, that as the owner of the basic moistureproof product patent—and the complaint alleges, your Honor, that that is the most important product in the case by far—that as the owner of that basic product patent, the validity of which is not attacked, and which is of our own invention, we had the legal power apart from tariff to exclude imports of moistureproof cellophane.

The COURT. Those are all legal factors which have no little importance. However, am I going to be shown whether in fact the American market itself could or did absorb all of duPont's production?

Mr. GESELL. Yes, we are coming to documents which will show that the American market did absorb all of duPont's production except possibly in certain depression years when the plants
4574 did not operate at capacity. In fact, duPont was always trying to catch up with the demand not anticipated. We are coming to that subsequent phase of the case.

The COURT. I like to deal with and apply legal concepts to realities.

Mr. GESELL. Yes.

The COURT. That is why I wanted to get that factual background sometime in the course of the case.

Mr. GESELL. I think we come to it, your Honor, in the next section of these documents that Mr. Minicus has and in later sections as we go along it will become increasingly clear that duPont's product was so superior qualitywise, not only against the foreign product which came in from time to time, but even as against Sylvania's product here in the United States, that customers demanded the duPont product because it made the best, and there is much evidence on that coming along also.

But it seems to me at the start we ought to have clear what the tariff situation is and what the patent situation is as they relate to this problem of imports.

Mr. Minicus referred to Exhibit 392 at page 5441 in which was shown before we entered this business concern with the question of tariff protection. Mr. Minicus said that showed the thought in duPont's mind. Well, I ask your Honor, can any reasonable business man embark upon a new venture without consider-
4575 ing whether competitive goods are able to come over the tariff wall? Would any responsible executive committee of

duPont or any other American company approve a project without being informed by its executives as to whether there was likelihood of goods coming over the tariff, and if so, how much? And here is a report by Dr. Sparre developing all aspects of this business, of which tariff is one, in which he points to the tariff problem. And then Mr. Minicus read with emphasis that won't appear in the transcript, "It is, however, possible that the Treasury Department could be made to assess duty on the basis of 40 cents per pound." I can't believe he is suggesting improper influence on the Treasury Department, because he knows the facts and they are matters of public record, and I think it is time that we stop talking about companies legislating tariff walls and talked about what the statutes of the country provide and what the hearings of the Congress on this question of tariff as to cellophane show.

4576 Mr. MINICUS. I think I have a right to correct my own statement, your Honor, in the light of Mr. Gesell's statement.

The COURT. Yes, sir.

Mr. MINICUS. When I spoke of legislating tariff walls, your Honor, I had no thought in mind of a relationship between duPont and the powers that be behind the tariff. I mentioned legislation of tariff walls in this regard, that by its relationship with its alter egos abroad, or its co-conspirators, the effect of those agreements was the same as to legislate tariff walls.

That is the second time this allusion has been made. I didn't pick it up the first time, your Honor. I didn't think it was important. But if it is going to be stressed, I want to have that clear.

Mr. GESELL. Well, now, let's see what the complaint says, because Mr. Minicus may amend the argument that he made this morning, as we begin to focus the issue, but he cannot amend the complaint, except in a little more formal way. The last sentence of paragraph 43 reads, "To support and maintain its monopoly duPont has sought the establishment and maintenance of high import duties on cellophane * * *" and look at this, your Honor "* * * with the intent and effect of thus eliminating and preventing the importation of cellophane into the United States."

4577 Now, if that isn't a charge by the Government which ties in with the emphasis given to "made" the Treasury when we read 392, I don't understand plain English. Now I am addressing myself to that issue tendered by the pleadings unless the Government wishes to withdraw it.

The COURT. Now, Mr. Minicus.

Mr. MINICUS. I stand on that contention. I simply show that this was not the passive beneficiary of a monopoly.

Mr. GESELL. And if those rather vague words are put down to business realities, it means that if an American citizen goes to

court and says that an arbitrary government agency has misclassified a product under the tariff, that it is doing something impassive and monopolistic. And I say it is simply exercising its rights as a citizen, and that is all that happened here, and that is what I propose to show to the Court.

The Tariff Act of 1922 is where we start, paragraph 31. Just to dispose of caps and bands on the way by, that tariff, enacted in '22, before Du Pont ever got into this business, provided a 60 per cent tariff on caps and bands—60.9 per cent. And that was carried on in the Act of 1930. So that throughout this period, beginning before DuPont ever went into this business, we had a 60 per cent tariff on caps and bands, and there never were any imports before we got into the business, and there were never any imports after we got into the business.

4578 Let us turn to cellophane, another product in the case.

Under the 1922 Tariff Act a duty of 25 per cent was provided on gelatin sheets, in paragraph 42, and a duty of 55 cents per pound, which would be at least 45 per cent ad valorem on products of cellulose not compounded, paragraph 1213, and a duty of 40 cents per pound on compounds of cellulose in sheets.

Now, the Treasury Department, your Honor, in 1925, under paragraph 1213, refused to reclassify cellophane, and we went through a lot of litigation about it, and on February 20, 1929, in Du Pont Cellophane Company versus the United States, TD No. 43232, a decision of the Customs Court classified cellophane as a compound of cellulose, dutiable at 40 cents a pound. And that decision on appeal was affirmed.

That was the result of litigation brought by Du Pont to force the Treasury Department to classify cellophane under an existing Tariff Act in accordance with what the statute provided. And the appropriate Courts of the land, after hearing the lawyers on a fair trial determined——

Mr. MINICUS. I have an objection to that, your Honor.

Mr. GESELL.——that there was a misclassification by the Treasury.

The COURT. All right, Mr. Minicus.

Mr. MINICUS. I believe Mr. Gesell has very flagrantly
4579 abused his right of comment here. This is the plaintiff's case. We have a great deal of evidence on this material to come in. The index indicates that that will come in at its proper time. We feel that we must insist upon our prerogative of introducing our evidence at the time that we feel it is best suited to our case.

Now, I have no objection to Mr. Gesell discussing the material in Exhibit 392, which I said was introduced to show a state of mind at a particular time. He has gone considerably beyond that.

He discussed additional tariff acts beyond that year, court actions and other matters that have not yet gone into evidence. I think that the plaintiff should be able to hold to its right of introducing that material first and then permit Mr. Gesell to comment on it.

The COURT. Do I understand that there is to be a proffer of proof from the Government on those items?

Mr. MINICUS. An extensive proffer of proof.

The COURT. I think Mr. Minicus has a point there, Mr. Gesell.

Mr. GESELL. May I be heard with respect to that, your Honor?

The COURT. Yes.

Mr. GESELL. We had statements when he opened that there had been no imports into this country for the entire period, that they could be ignored, that right from the beginning we had a
4580 state of mind as to the tariff, and he developed at great length this whole significance of imports. I should think I could discuss matters of public information concerning that.

The COURT. Well now, it all goes to the order of proof, that is all. That is our problem here. It is not a difficult one. When Mr. Minicus came to the courtroom this morning he said, "We are entering a new phase of the case, Act 2"—right?

Mr. MINICUS. Yes, sir.

The COURT. And he spent some time in developing in general what his theme was going to be, and as I understood from his remarks, that was all preliminary background which would be followed later by his putting into the mosaic separate and distinct pieces of evidence. Now, in support of his general statements on imports he is going to introduce documentary proof along that line.

Now, unless you have some vigorous or cogent reason otherwise, why would it not be proper for him to make his general statement, to put in his evidence, and then when you come to comment on the '22 Tariff, the '30 Tariff, then you could do so? It seems to me you are being drawn into a discussion ab minutiae at a time when the detail is not before me.

Mr. GESELL. Well, how do I deal, your Honor, with the reading of a specific paragraph with respect to tariffs and a discus-
4581 sion of our evil state of mind without discussing what the context of the business problem was in which that letter was written? That is my problem.

The COURT. I know. I have got problems also. Anything that Mr. Minicus says you know as a lawyer, and a very good one, is advocacy. I have no proof before me yet. And in answering his preliminary or opening statement you are drawing my attention to specific data, and frankly I am sitting here and I say, "Well, '22 Tariff—what happened? Du Pont's suit in connection

with tariff, before the Customs Court," and my reaction is that I do not know anything about that. Nobody has hold me about it yet.

Mr. GESELL. We are going to have that problem, though, your Honor, throughout the case.

The COURT. Well, we have not so far.

Mr. GESELL. They are only telling you about certain business facts and not about all business facts and I want to come in here and put these various bits of writing, which he takes out of context, and put them in the frame of reference of the business situation. But if your Honor feels I am transgressing——

The COURT. I do not feel that you are transgressing.

Mr. GESELL. ——I can delay the discussion for a later time.

The COURT. That is not my point, Mr. Gesell. My point
4582 is, how do we best present the picture to the Court? That is my primary object, and I do not feel that anybody is—well, I better not say that; I was going to say, nobody is guilty of transgression, but maybe that is one of the issues in the case. So I would think that if perhaps you would answer his statements as to what the proof may show without taking your scalpel and cutting too fine into the meat of the question, it may be better. We will satisfy Mr. Minicus' objections and I do not think that taking such a course will be unhelpful to me.

Mr. GESELL. Well, that is what counts with me, your Honor. I will finish on the tariff and simply by saying this, that the 1930 Tariff was passed and the deliberations of Congress show that the importers went before the Congress and said, "This will give Du Pont a monopoly of cellophane if you put on this prohibitive tariff." And the Congressmen heard it and put on the prohibitive tariff.

Now, I do not say that that is Du Pont legislating. I say that it shows the operation of the Congress of the United States when they enacted this Smoot-Hawley Tariff. They knew it would be prohibitive and they imposed it.

Mr. MINICUS. There is no evidence about who went before Congress, your Honor, in this case. We intend to put that evidence in, I admit.

Mr. GESELL. All the Court has to do is read Volume I of the hearings of the Tariff Act of 1929 before the Subcom-
4583 mittee of the Committee on Finance of the Senate. But you have got enough to read without that so I will leave the tariffs.

On this state of mind, your Honor, is this within the limits of this discussion or not? We discussed 392 and the three things that were referred to were, one, that we had control of Du Pont Cellophane. I want to deal with that. Second, our state of mind

as to tariff. And third, our state of mind as to the rate of return. I think I should point out to your Honor that there were other important states of mind in 392 to which reference was not made.

Your Honor asked what is the relevance of good faith. Why, it is one of the key issues in this case—questions of purpose and the intent on the pleadings. And now we have in 392 large sections that have never been read to the Court which shows our great concern with the principal competitive products we were going to have to meet when we went into this business, gelatin, tin foil, glassine paper, which were lower priced and more established, and there was a great discussion as to whether we ought to embark on this venture in the face of those conditions in the market. I again call attention to that. I do not want to go beyond the bounds, but I say if you want to know the state of mind of the company at the time it entered the business, 392 must be read in its entirety. And it misrepresents the document to pick a sentence here or a sentence there and say they thought they were going to

4584 have a big return when over on an earlier page it shows we thought we were going to have an awful lot of competition that we couldn't under any circumstance control and we were going to have a hard time in this market. So if you want to get the business realities of the situation, 392 must be read in its entirety.

On this issue of control, reference was made to page 5429, that all you had to do was look at the stock holdings and it was obvious that duPont controlled Du Pont Cellophane Company. Well, I simply say to your Honor that Exhibit 1001, at page 995, discloses the intricate terms of the by-laws of this corporation which gave very large and influential rights to the French, far beyond their stock holding, voice in all aspects of the management, veto power over expenditure of money, selection of board of directors, and other matters of that kind. This was a true joint venture. And to approach just the stock holdings on this exhibit and say that that shows the whole picture is again to ignore the business facts of the underlying documents.

The Court. In short, your position is that the corporate powers were so evenly divided that it was at bottom a partnership?

Mr. Gesell. Yes, and that it functioned that way—not only on the corporate papers but that is the way the corporation functioned.

The extraordinary unwillingness of the Government to

4585 show you who the directors were and the great interest to show who Sylvania's directors are is something I find difficult to understand since we spent so many days on Du Pont Cellophane Company.

The other reference that was made in this document was to the fact that duPont, at page 5455, showed an interest in whether it

was going to have exclusivity, and I emphasize again to the Court that the documents show that duPont was acquiring significant know-how and inventions from the person which the evidence shows was the only known commercial manufacturer of cellophane. And since the contract said the rights were exclusive, naturally it talked about having exclusive rights because that is what the contract provided.

Now we turn to Exhibit 12, at page 91. That was offered to the Court for the purpose of showing that cellophane was primarily a wrapping material and that it had wide uses. We are coming to evidence that will show that the non-packaging uses were never more than five or six per cent. But the exhibit shows something else of great significance in this case, which was not pointed out, at page 92. There is a schedule listing cellophane's principal markets and examining duPont's position against the market potential, and again and again in the exhibit you see the indication of the existence of competitive materials which limit duPont's potential in those fields. The figures were not discussed, but the figures show it. We hope in candy, for ex-
4586 ample, to have nine million pounds by the second post-war year against a practical potential of fourteen million. We hope in bread, your Honor, to have 42 million out of the 1950 practical potential of 107 million. Well now, we are starting to talk about percentages that show what this market really is—not the 78 per cent or the 85 per cent, but right here on the exhibit. Macaroni, we hope to have two out of five; that is a two-fifths percentage. In cheese, two out of seven. In hosiery, one million five out of four million seven. Down that whole exhibit you see the reflection of the existence of this substantial competition in these packaging fields by the other products that we are meeting in the market.

So we have on two exhibits here, 392, the concern of the people that went into the business in the first place that they were meeting this competition, and on the next exhibit offered, going right up into the post-war period and showing that at that time our fondest hopes did not involve anything like dominating penetration into these packaging uses.

When we get into the schedules that appear on the subsequent pages, which are schedules of packaging uses where our price is not adequate or our quality is not adequate yet, and where we have to do particularly hard work, we find that our percentage is even lower, and that the competitive wraps are higher.

4587 Then we come to Exhibit 9, the third one they have offered in this field of transparent wrapping materials, which is referred to as relating to packaging—you see reference to pliofilm; you see reference to cellulose acetate; and some of the other com-

petitive films, even in the same Government publication. And where does most of the information about it come from? From paper trade journals.

Now, Exhibit 11, your Honor——

The COURT. You remember the first day of the trial you showed me three examples of wrapping that appeared to be cellophane?

Mr. GESELL. Yes.

The COURT. Do they fall within the classification you have just referred to?

Mr. GESELL. Yes. I showed your Honor on the opening pliofilm, glassine, wax paper, which are among the ones I have been discussing. I think I also showed you some foil. I did not show you all of them. They were mere samples, but I did, I am sure, show you glassine, commercially transparent wax paper, and pliofilm. I think there may have been one or two others in that group. If your Honor ever does the shopping for your household and goes into the super market you will see plenty more of them, though I doubt you have the time any more than I do.

4588 On Exhibit 11 I have already commented on the question that this was sending to Sylvania public information that appears in Modern Packaging, but I ask your Honor to look at the schedule of uses, and here is the point we want to emphasize: This shows fifty different kinds of cellophane.

The COURT. Let me see that.

Mr. GESELL. It is Exhibit 11, page 85. Here are fifty different kinds, commercially made and used and sold by duPont. What your Honor sees there is one of the great characteristics of the market in which cellophane is sold. You see the tailormade development of films designed to meet specific packaging uses, and to be in a position to compete with the other materials serving that use.

Mr. MINICUS. There is no evidence before the Court at this time that duPont developed all those uses.

Mr. GESELL. I am not talking about who developed them. I am talking about selling into them. We came in a market that was already established as to some uses. We did not develop them; we got in them and broadened them. Here are a great number of uses, different packaging uses with films specifically designed to meet the particular need. Sylvania, which has not as big a percentage of this business, did not do this, your Honor. Sylvania was content to go along with many fewer films, and duPont in all cases led, as the evidence will show.

4589 Let me show you how this goes. If you will turn to page 89 you will see that there are different films made there in the middle of the page for hot climates and dry climates for comparable uses. You will see on page 87 some films for hot,

hard candy—that is, candy that has to be wrapped when it is hot and is hard, and down below a wholly different kind of film to wrap cold, hard candy.

Here you begin to see some reflection of the market in which cellophane is being sold, some reflection of the kind of things that are wrapped, and some reflection of the great ingenuity and research skill that duPont put into this business in order to stay where it is in the business. We are now getting to some of the realities of this market position.

I am not going to take the time to read all of this, but your Honor, I think, from glancing at them will see the great variety of packaging uses and the great variety of types. In the main, most of the types fall in the moistureproof field, and of course volumewise they are 85% of the business.

Mr. MINICUS. There is no evidence as to that, your Honor. I think we ought to have some basis in the record for Mr. Gesell's statements.

Mr. GESELL. Do you dispute it? Your complaint says it is the most important. Do you dispute it is 85%?

Mr. MINICUS. I stand on my position, your Honor, that in
4590 the pre-trial conference it was agreed that Mr. Gesell would comment on the evidence as it appeared in the record. There is apparently a great proportion of this trial set aside for his defense. If he puts all his defense in on the presentation of our case, I don't know what he is going to be able to say at that time.

The COURT. You are not worried, are you?

Mr. MINICUS. Not a bit. I am worried about having his defense engrafted on our case.

The COURT. I understand.

Mr. GESELL. In the group he is coming to, 395, he has evidence that shows the percentage I am referring to. Why do we have to be restrained on our discussion of this that shows an undisputed fact?

The COURT. Let us go to the challenged sentence.

(The reporter read the following:)

"* * * and of course volumewise they are 85% of the business."

The COURT. Don't you want that brought out at this time? You say there is no evidence on it?

Mr. MINICUS. There is no evidence on it.

The COURT. I will disregard it.

Proceed, Mr. Gesell.

Mr. MINICUS. Do I have to get up and object every time Mr. Gesell makes a statement that is not borne out by the evidence?

4591 Mr. GESELL. I think he can object when I make a statement that I can't prove from his exhibits, but I certainly am entitled to say that we have a statistical table coming that shows 85% that is relevant to this.

The COURT: We all know that document is going to go into evidence, and the quarrel is that Mr. Gesell is anticipating by maybe a matter of minutes or hours a document that is coming in.

Mr. MIXICUS. It doesn't happen to be the case, because Mr. Gesell takes this position: To get a percentage like that we also have to get Sylvania's statistics, and Mr. Gesell has objected to all our documents on which our Sylvania statistics are based. At the present time in the light of the objection I don't know whether we are going to get them into evidence or not.

The COURT.—We have to get on. For the purposes of the record, let me state that I have disregarded what Mr. Gesell said about the 85% figure.

Can you proceed after that, Mr. Gesell.

Mr. GESELL. Yes.

The COURT. All right.

Mr. GESELL. Exhibit 28 was the next one that he discussed which appears at page 142. This exhibit develops some very important facts to this case. It shows that Brandenberger brought the transparent film to the point of practical
4592 produuction, which is one point I have been constantly making here. It shows that he himself came over here and helped us set up the plant at Buffalo and taught us the secret processes in 1924. It shows that the French were not interested in developing this business in the way that we could develop it, that they were going along with a luxury trade and interest had begun to drop off and that we took the idea—and this exhibit does not show, but the evidence will show—and developed it to what it is in the United States; and it shows, your Honor, the substantial price reductions from $2.65 to 33 cents a pound—2.65 to 33 cents; and it contains this important senterce:

"duPont chemists in 1926 and 1927 developed a moistureproof coating for cellophane which greatly expanded the product's usefulness in protective packaging. As markets expanded and production increased the duPont Company continued to reduce the price, and today this improved moistureproof film sells for 41 cents a pound, while the plain, transparent film, which was $2.65 a pound in 1924 is now 33 cents a pound."

There in capsule form, in two paragraphs, is a statement of what duPont did. It took an idea; it improved it as to quality; it improved it as to use; it invented the practical commercial

product; it put it on the market; it expanded volume and reduced price. Legitimate business objectives, legitimately achieved.

Now, I had intended, your Honor, to discuss at
4593 considerable length one other exhibit which appears in this group, and that is the exhibit that develops the nature of the patented product and the nature of the patent coverage, No. 26, which appears at page 135. You will see there a development again, on this plaintiff's exhibit, of our defense. For example, it says, "The original product"—the original product, plain cellophane, at page 136—"The original product could not compete with wrappers such as wax paper wherein permeability to water vapor was desired." There is evidence of our competitive problem. There is evidence of the subsequent significance of the development of the moistureproof patent. The original product could not compete. The product of duPont's invention could.

You will see on the next page the discussion of the invention of the moistureproof patent as the result of extensive research, and on the final page a discussion of the related patents in the last paragraph, which developed various significant method patents which issued two years subsequent to the basic patent and which I have referred to in my openings and elsewhere as being the inventions of discovery of duPont that covered this moistureproof product from start to end.

I would like to ask your Honor at this stage, but I am afraid I am going to get beyond the discussion that is appropriate, to turn to those patents and to read their claims and to see their
4594 scope and significance. They are important to this document because the document discusses them, and they are important to imports because those patents enabled duPont as the lawful owner of the valid patents to exclude the imports.

Now, I am quite aware that we have a patent section of the case coming in which I suppose we are going to discuss patents at length, but there are numerous references throughout these exhibits, of which this is one,—and we are going to get them in almost every group that Mr. Minicus comes to here—to the moistureproof product patent, to the doctor rolls, to the rehumidifying process, and at some stage, wherever your Honor wants to set it aside, I would like to put those patents before you and show you what their claims are, show you their significance, their essential basic facts, all of which are necessary to an understanding of this product, this market, and this case.

The COURT. On the first day of trial didn't some one hand me a book of all the patents that could possibly have any relevancy to the case?

Mr. GESELL. Yes, your Honor.

The COURT. Where are they?

Mr. GESELL. There are three books of which these that I referred to are in the first volume.

I have marked with Mr. Pollard's permission, these basic patents.

The basic product patent is 1,737,187, the so-called Charch and Prindle patent. I don't know whether your Honor wants me to develop that. The other patents are the ones marked. They start at 1,826,696 and run consecutively in numbers. They all issued at the same time. They run to 699. They cover not only the product, but they cover the only known commercial process for rehumidifying.

4595

Mr. MINICUS. I think that is entirely testimony, your Honor, again, to say it is the only known process for rehumidifying.

Mr. GESELL. The documents show that Sylvania practiced that patent throughout its life.

Mr. MINICUS. There are no documents in evidence, your Honor, to show that. I don't know that there are going to be.

Mr. GESELL. It is in your case.

Perhaps I could ask your Honor to mark certain portions of the patents for future study. I am quite prepared to deal with this in any way that your Honor wants me to.

The COURT. You mean I have three volumes of this to read?

Mr. GESELL. I think there are four, but if your Honor is going to appraise license agreements involving patents and is going to appraise whether or not this product was or was not covered, we are going to have to refer to patents as we go along, and I am clear you will have to read many times or at least once pretty carefully these basic ones, because they are at the essence of the case.

4596

Mr. MINICUS. May I suggest to your Honor that if we follow the more usual procedure when the Government introduces a particular license your Honor will then be aware whether he wishes or desires to read that or not. There is no necessity of considering——

The COURT. You mean I should measure the patents only insofar as they become relevant to a certain license agreement?

Mr. MINICUS. I think that will become quite clear to your Honor if we are allowed at the proper time to put in our evidence.

Mr. GESELL. I don't want to do that as to these basic ones.

The COURT. I want you to take these basic patents and either in red, or blue or green pencil mark along the side of the column or underline what will according to your case develop to be the important segments of that patent insofar as it relates to a particular license.

Is that right, Mr. Minicus?

Mr. MINICUS. That is correct, your Honor.

The COURT. I think maybe I ought to have that tutelage on the patents before the case gets too old.

Mr. GESELL. That is the way I feel.

The COURT. Because I would like to have that in mind in order to understand the theory of the defense as to their utilization of that patent.

4597 Mr. MINICUS. I think I can give your Honor an explanation of that when Mr. Gesell is finished with his comments.

The COURT. All right.

Mr. GESELL. You see, the patent issued in 1929, and the result is it appears in practically every set of documents that we are going to discuss in this section, and of course it is throughout the other sections. Possibly after recess we could set aside a day and discuss this patent situation as a prelude, and then I would not have to keep bumping up against it as we come to these documents.

The COURT. I think that is a good idea. In other words, we will select some date between now and the time when we resume the trial again, and we will set that aside for the patent discussion. You wanted to say something about that matter, Mr. Minicus?

Mr. MINICUS. Yes, your Honor. It happens to fit into a statement that I desire to make in reference to Mr. Gesell's general comments on what we had thought were merely preliminary documents.

It is true that these documents divulge certain facets of the defendant's business; it is true that the defendant was interested in good business practice. Now, I think I dwelt on that quite at length in the opening statement, saying that the

4598 Government had no objection to good business practices providing they were good not only from the business man's point of view, but from the point of view of certain statutory restrictions that there are on business practices. I might also point out to your Honor that the cases have held originally that what is lawful when done by one, becomes unlawful when done in concert. I might also point out to your Honor that within the last 10 years enlightened courts have seen that there is no difference between what is done in concert and what is done by a dominant unit in the industry. In other words, if we have four, five, six, seven, or eight units in the industry adding up to 75% of the industry, what they do in concert is illegal because of the economic power behind it. As Judge Learned Hand said, What is the difference when a single unit comprising 75% of the industry does the same thing? Therefore I think it should be before your Honor at all times that when we are considering these individual practices, be they certain activities with regard to the tariff or with regard to patents or with regard to refusals to deal, that we are here dealing with a very dominant unit in the industry.

Mr. GESELL. Now you are talking about——

The COURT. Just a moment. I think I find this good practice: When you are going to object—and this goes for both sides—wait until the sentence is finished.

(Mr. Minicus' last remarks were read by the reporter.)

4599 Mr. GESELL. My remark simply, your Honor, was that now he is discussing evidence he has not proven, because he has not proven the indusfry, and he has not proven any domination.

I should have kept quiet.

4600 The COURT. Mr. Minicus.

Mr. MINICUS. Your Honor addressed a question to me a short while ago that slipped my mind. I am trying to recall what that question was.

The COURT. So am I.

(The record was read.)

Mr. MINICUS. That brings us right to the point, and also to the point of Mr. Gesell's objection. For the reasons that I have just stated, in considering our order of proof in this case it seemed necessary to establish that dominance before proceeding to the patent question. Therefore we would like to get the question of the dominance before the Court before we do take up the patents because it is not as a matter of proof but our contention that this dominance will invade upon the patent situation.

* * * * *

4630 Mr. MINICUS. Return now, your Honor, to a subject appearing in the trial brief at paragraphs 47 and 49. This subject matter appears under the heading of "Expansion of Productive Facilities by the duPont Company." We intend to show that the expansion of the defendant's production has resulted in an increased output for nearly every successive year since 1930 and that that expansion has multiplied itself many times.

On the question of expansion I hope we will be able to make ourselves thoroughly understood, that we are not in this trial attempting to show that duPont has violated any law by expanding its machinery. As I pursue our elucidation of this point, I think it will become increasingly apparent that this is another one of the items that the Government is employing to show that the position of the defendant in this industry is not a matter of happenstance, or something that was thrust upon it.

4631 The COURT. Where did you get that word "happenstance," from Justice Douglas' original opinion?

Mr. MINICUS. No, sir. I am not ghost writing for him either. We believe we can show at the end of this discussion very strong judicial authority for our position with regard to it.

In large sense the problem presented here resolves around intent, and with that thought in mind I will proceed to a breakdown of the points under the heading. There are subdivisions of this subject matter dividing it into four points. The first point is that successive expansion of the defendant's productive facilities for cellophane has been effected in anticipation of increased demand, very often far in advance of the actual occurrence of that demand. And in support of that position I will briefly offer several exhibits.

The first is Government's Exhibit 419 at page 5633.

(Report of meeting of Executive Committee, Du Pont Cellophane Company, held February 13, 1929, was received in evidence and marked "Government's Exhibit No. 419.")

Mr. MINICUS. I will commence reading with the first "Whereas" clause in the middle of the page. I commence reading:

"Whereas, as pointed out by the General Manager of Cellophane Department, forecasted sales of Cellophane indicate
4632 the need for providing additional manufacturing capacity in the near future, as shown by following forecast figures."

Then we have forecasted figures for the years, in table form, 1929, 1930, 1931 and 1932. I might say that the date of this exhibit is February 13, 1929. I commence reading:

"And whereas, with installation of Casting Machine No. 8 at Buffalo Plant (scheduled for operation around March 1, 1929), we will have a total annual capacity, with all 8 casting machines running full time (and no provision for spare casting machines of around 5,100,000 pounds."

The Government offers in evidence Exhibit 125, appearing at page 426.

(Memorandum signed by J. E. Hatt to the Executive Committee, E. I. duPont de Nemours & Company, dated September 1, 1943, was received in evidence and marked "Government's Exhibit No. 125.")

Mr. MINICUS. Beginning at the fourth paragraph, on page 426, I commence reading:

"Our present production capacity, including one unit at Buffalo, is approximately 100,000,000 pounds per year. At present we are selling at this rate. At the end of the war we expect to recover that portion of our normal business which was temporarily diverted to war uses, including Lend-Lease, as a result of war-time exigencies."

The date of this exhibit is September 1, 1943.

4633 I commence reading:

"For the first postwar year we forecast a volume of at least 110,000,000 pounds with probable increases of 10,000,000 pounds per year for several years, based largely on increased

volume in the baking industry, including bread, and in frozen and dehydrated foods. This projected rate of growth is conservatively in line with past experience. During the ten years preceding governmental war-time restrictions, our cellophane business increased at a compounded annual rate of 15.4%.

"To insure increasing sales to these markets, we contemplate successive reductions in the price of cellophane as added capacity is available. At the end of the third postwar year we expect to sell moistureproof cellophane at 36 cents and P. T. at 33 cents, or an average of 35.3 cents per pound, against 1943 actual prices of 40.5 cents for moistureproof and 36 cents for P. T., or an average of 40 cents per pound."

The Government offers in evidence Exhibit 109, appearing at page 403. This is a letter from T. L. Hines to Messrs. White and Denham, both of the Rayon Department of the duPont Company, and it is dated November 15, 1945.

(Letter from Mr. Hines to Messrs. White and Denham, dated November 15, 1945, was received in evidence and marked "Government's Exhibit No. 109.")

Mr. MINICUS. I commence reading:

4634 "Proposed Cellophane Expansion.

"Some time ago Mr. Brown presented our revised sales forecast for the second year postwar with a total poundage of 169,000,000 pounds. To provide for this volume we present the following program.

"Our present capacity is rated at 104,000,000 pounds, and we have projects authorized and construction started to provide 28,000,000 additional pounds at Clinton, and 3,800,000 pounds at Spruance. This will give us a total of 136,000,000 pounds.

"Until recently our standard speed of casting for moistureproof film was 60 meters. Our more modern machines at Clinton and Spruance have been run at 75 meters and experimentally we have cast film at speeds as high as 100 meters. Physical tests indicate that at 100 meters there is deterioration in some desirable qualities. We do not consider it safe to operate at a speed of 87.5 meters for moistureproof film and believe that as a result of further study we ultimately can successfully make film on our modern machines at a speed of 100 meters.

"The Engineering Section of our Technical Division has surveyed Clinton, Spruance and Old Hickory and have given us a preliminary estimate of the money required to permit 87.5 meter casting speed at those three locations. This totals $7,600,000 for which we will increase our capacity by approximately 29,000,000 pounds or $.2603 per annual pound. We

4635 probably should add about $150,000 to the above figure because we expect to present a project for a new office

building at Old Hickory. However, this project will be presented whether the above mentioned expansion materializes or not.

"Should this program be followed, we would have a total capacity of about 165,000,000 pounds against Mr. Brown's forecast of 169,000,000 but as stated above we believe that we can before too long develop the proper technique to carry our casting speeds up to 100 meters.

We attach hereto a tabulation showing our present capacity, the approved expansion program and our proposed further expansion, with details showing our present permanent investment and our ultimate permanent investment, together with our working capital and figures developing the picture on the investment per annual pound. It should be noted that today our permanent investment is $.3086 and our working capital $.0744, making a total of $.3830. At the completion of our proposed program our total investment figure is estimated to be slightly below 36 cents."

On the following page of this exhibit, 405, we have a table headed "Rayon Department—Cellophane Division."

The COURT. Tell me how those figures operate. It is not clear to me. What are they talking about?

Mr. MINICUS. I believe that the table will draw that to your Honor's attention.

4636 The COURT, I see.

Mr. MINICUS. In the table, the first major horizontal subdivision, under "Production," we find "Clinton, Spruance, Old Hickory and Yerkes." Then moving to the right in the first column we find a statement of the present capacity at the time of the writing of this exhibit, 1945, and listed for Clinton, 20,000,000 pounds; Spruance, 36,500,000; Old Hickory, 34,200,000; Yerkes, 14,000,000. And the total of 104,700,000 pounds.

Then moving to the right, to the next column, we find "Approved Expansion"—that is, expansion that had already met approval by the officials of the defendant company, and there we find that the stated amounts of expansion have been approved for Clinton and Spruance.

The third column, moving to the right, shows the total of present capacity plus approved expansion.

The next column to the right is "Capacity Added By Proposed Expansion," and we see stated in millions of pounds the proposed expansions of three of the plants.

Finally there is a grand total of expansion, showing that at this time the expansion in contemplation would have moved the capacity of the corporation stated in 1945 to be 104,700,000 pounds up to 165,700,000 pounds.

The Government offers in evidence Exhibit 114 at page 412.

4637 The COURT. I am still on 109. These cent figures interest me. It says, "It should be noted that today our permanent investment is $3086 and our working capital $.0744, making a total of $.3830." Does that mean that they must get that much?

Mr. MINICUS. My understanding of those figures is, your Honor, they have a procedure in the company of reducing, breaking down a great many of their statement figures to per pound valuation of the product—

The COURT. In terms of invested capital and working capital, is that correct?

Mr. MINICUS. That is correct, according to the per pound of the product.

The COURT. I see.

Mr. MINICUS. The Government offers in evidence Government's Exhibit 114, appearing at page 412. This is a report to the Executive Committee from the Rayon Department dated January 11, 1946. It is signed by Mr. T. L. Hines.

(Report signed by Mr. T. L Hines of the Rayon Department to the Executive Committee, E. I. du Pont de Nemours & Company, dated January 11, 1946, was received in evidence and marked "Government's Exhibit No. 114.")

Mr. MINICUS. I commence reading at the third full paragraph of page 412:

4638 "The capacity of all our present plants, including construction already authorized in projects 394 and 395, is approximately 136,000,000 pounds. This project upon authorization and completion will increase this total capacity to approximately 144,000,000 pounds.

"We propose to later submit an additional part of project 395 to further increase the capacity of our Spruance Plant by a corresponding increase in speed of casting. This is estimated to give us an additional 14,000,000 pounds annually, which will bring our total annual capacity to approximately 158,000,000 pounds, against our sales forecast of 165,000,000 pounds for the year 1947.

"To provide the indicated further increase in production facilities, the Engineering Department is estimating the capital expenditures and the increased volume that would result for higher speed casting at our Old Hickory location, which should provide another 15,000,000 pounds annually. If these plans look attractive from an investment viewpoint, we should then have available in 1947 a capacity slightly in excess of 172,000,000 pounds."

I would like to move now, your Honor, to our second subdivision under this heading of expansion. Our purpose to this point has

simply been to show the ability of the company to forecast, very often many years in advance, the demand that impinges for the future, and its expansion plans, and approve expansions
4639 considerably in advance of the forecasted demand to take care of the market as it developed.

Mr. GESELL. You say we are guilty because we guessed wrong or we are guilty because we guessed right?

Mr. MINICUS. Are you addressing the Court?

Mr. GESELL. I would like a clarification of the issue, your Honor. What is it? That we did not guess correctly or that we did guess correctly?

The COURT. Well, I do not think that Mr. Minicus is offering the material for that purpose. I have not quite got it yet. I am trying——

Mr. MINICUS. I think if I may be permitted to proceed, your Honor, it will develop. I feel quite certain that I can make the point——

The COURT. Would you mind reading several sentences back Mr. Minicus' statement.

(The Reporter read the following statement:)

"Mr. MINICUS. * * * Our purpose to this point has simply been to show the ability of the company to forecast, very often many years in advance, the demand that impinges for the future, and its expansion plans, and approve expansions considerably in advance of the forecasted demand to take care of the market as it developed."

The COURT. Well, I do not think that contains any charge against you. He is sort of paying you a compliment, I guess.

4640 Mr. GESELL. That is why I was confused, your Honor.

The COURT. That was pretty accurate thought, wasn't it, Mr. Minicus, from 165,000,000 to 169,000,000?

Mr. MINICUS. I think it was exceedingly accurate, except I think the proof will show, as the case develops, that it did not work out that way.

The COURT. I see.

Mr. GESELL. We always underestimated in most cases, your Honor.

4641 Mr. MINICUS. Our second heading under the expansion point is devoted to the proposition that the defendant's expansion program was effected in part, at least, for the express purpose of anticipating and preventing and discouraging anyone who might otherwise be induced to engage in the manufacture of cellophane. In other words, there are undoubtedly a great many reasons why the duPont Company expanded its production. My

only purpose here, your Honor, at this stage of the case is to show that one of the things they very often considered in approving expansion plans was the competitive effect those plans would have on the market.

Now, with that proposition in the background I proceed to Government Exhibit 417 at page 5628. It is a letter by Mr. L. A. Yerkes to several executives of the duPont Company at that time, Mr. May, Mr. Lee, Mr. Twing, Mr. Moore, and one other. The document is dated March 27, 1928. I offer it in evidence.

Government Exhibit No. 417

(A letter from Mr. Yerkes to Mr. May et al was received in evidence and marked "Government Exhibit No. 417," said letter being dated March 27, 1928.)

Mr. MINICUS. I commence reading:

"Sales of 'Cellophane' for the past two or three months have exceeded our forecasts by such large amounts that it is obvious that immediate consideration should be given to the construction of an additional casting machine, or perhaps two. Any
4642 further substantial increase in the business, due to reduction in our selling price or a favorable decision in the tariff matter or the development of any new outlet, will put us in a very bad position with regard to deliveries, even with the fifth machine in operation.

"I would like to have Mr. Benz, together with Mr. Lee and Mr. Twing, give this matter immediate attention and let me have as soon as possible and certainly before the next Board meeting in April, the result of your study.

"This is, of course, particularly a question of sales forecast for this year and next year. Please bear in mind that we can't afford to run short on deliveries.

"In connection with this whole matter, I think you should report what the additional expenditures will be for one or two machines, whether any additional Chemical Building is necessary, what the final total investment cost per pound of 'Cellophane' will be as compared with our present situation, what the operating cost will probably show, etc. etc."

The Government offers in evidence Exhibit 415 at page 5623. This is a report to the Executive Committee from the Du Pont Rayon Company on May 4, 1928.

(The report to the Executive Committee from the Du Pont Rayon Company dated May 4, 1928 was received in evidence and marked "Government Exhibit No. 415.")

Mr. MINICUS. At page 5624, which is the second page of the exhibit, at the top of the page, I commence reading:

4643 "Whereas, the said appropriation of $262,000 included

(1) Building space sufficient for Casting Machine No. 6;

(2) Fume stack capacity sufficient for Casting Machine No. 7, and

"Whereas, General Manager J. E. Hatt, under date of April 30, 1928, has requested authority for the installation of Casting Machine No. 6 at an estimated cost of $305,000 in which figure there is included $11,000 for fume stack, the funds for which have already been authorized, as related above, and,

"Whereas, the operation of six casting machines will give us an annual capacity of 3,960,000 pounds of cellophane, and

"Whereas, our annual sales have been: 1925—1,008,000 pounds, 1926—1,740,000 pounds, 1927—2,005,000 pounds, and

"Whereas, Forecast No. 1 estimated for 1928 sales of 2,500,000 pounds, and for the first four months of 1928 compared with actual as follows:

Month	Forecast	Actual
	Pounds	*Pounds*
January	180,000	189,000
February	160,000	206,000
March	175,000	223,000
April	160,000	222,000
Total	675,000	840,000

4644 or 25% in excess of Forecast, and,

"Whereas, the actual for the first four months of 1928 compared with 1927 shows:

Month	1928 actual	1927 actual
	Pounds	*Pounds*
January	189,000	138,000
February	206,000	121,000
March	223,000	133,000
April	222,000	113,000
Total	840,000	505,000

or 1928 is 67% ahead of actual for 1927 for first four months, which, if maintained for balance of year, will result in sales of 3,340,000 pounds which is equivalent to production of five machines, and,

"Whereas, Moisture-Proof Cellophane sales are increasing at an encouraging rate and into fields where regular Cellophane is not adaptable, and,

"Whereas, Imports have been estimated at 36,000 pounds per month which may be materially reduced if our suit for increase in tariff is favorably decided; thus throwing upon this Company

the responsibility of supplying the demand for an article of which it is the exclusive manufacturer in this Country.

"Therefore, be it resolved, that the Executive Committee will act favorably upon a project and will recommend favorable
4645 action to the Board of Directors on the basis of:

"(1) Ripening room equipment to provide for the sixth machine:

"(2) The Sixth Casting Machine:

"(3) Necessary equipment in Finishing Area for the Sixth Machine:

"(4) Necessary power lines and miscellaneous equipment to round out the plant for complete operation of six machines, it being understood that this entire project is estimated in a preliminary way to cost around $300,000., the item for fume stack having already been appropriated when Machine No. 5 was authorized, and

"Resolved further, that the General Manager of the Cellophane Department be requested to submit to the Executive Committee a formal appropriation request covering the Sixth Casting Machine at the earliest possible date."

The Government offers in evidence Government Exhibit 418, appearing at page 5629. This exhibit is an appropriation request.

(The paper headed "Appropriation Request", dated May 12, 1928, was received in evidence and marked "Government Exhibit No. 418.")

Mr. MINICUS. At the first full paragraph of the request I commence reading:

4646 "This Appropriation Request is presented to cover the installation of the Sixth Casting Machine, addition to Chemical Building with equipment, changes and additions to equipment within present building space in viscose ripening room and finishing area."

Skipping to the fifth paragraph, commencing with No. 2 in parentheses:

"The Du Pont Cellophane Company is the only manufacturer of cellophane in this country. In consequence we must be in position to supply any demand that develops.

"In addition, if the tariff decision is favorable to us, this will mean further increased business, so we must be in position to supply the equivalent imported amount."

The Government offers in evidence Government Exhibit—

Mr. GESELL. Are you going to skip 1, 3 and 4?

Mr. MINICUS. I so stated as I read it.

The Government offers in evidence Government Exhibit 420, at page 5636.

(The report from the Executive Committee to the Board of Directors of the Du Pont Cellophane Company dated March 21, 1929, was received in evidence and marked "Government Exhibit No. 420.")

Mr. MINICUS. This is a report from the Executive Committee to the Board of Directors of the Du Pont Cellophane Company. I shall only read the first page of this exhibit. I
4647 commence reading:

"DU PONT CELLOPHANE COMPANY

"NEW YORK CITY, MARCH 21, 1929.

"To: Board of Directors, Du Pont Cellophane Company.
"From: Executive Committee.

"Monthly report DCXB-6 recommendation for action

"App'n Request ODC-2½—Part 4—$400,000.
Old Hickory—Casting Machines Nos. 3 and 4.

"The following is quoted from communication from the General Manager of Cellophane Department in regard to sales forecasts vs. production capacity:—

"The forecast for 1929 now stands as follows:

	Pounds
"First 6 months	1,800,000
"Second 6 months	2,800,000
Total	4,600,000

"I regard the second six months as being more nearly a correct forecast than the first six months' period. During the first two months—January and February—we have exceeded the forecast by 82,000 pounds or nearly 14%. If we continue to exceed the forecast at this rate, throughout the year, we will add 640,000 pounds to it, or a total of 5,240,000 pounds.

4648 "With six machines operating for the first quarter of the year, or to the end of this month, March, and eight machines in production for the balance of the year, we shall be able to produce at Buffalo, a maximum of 5,000,000 pounds.

"With one machine in operation at Old Hickory, on October 1st., and another on November 1st., we would be able to produce an additional 250,000 pounds, which total operations will just meet the figures given above, if we continue to beat the forecast at the rate we have been at so far, during the past two months.

"In addition to this, the recent decision of the Customs' Court has apparently caused one of our competitors to withdraw discounts to the jobbing trade and special prices to some of their large trade. Some of this trade has already sent orders to us and some of

it has approached us regarding the establishment of arrangements for securing their supplies of transparent material from us. If it should develop that, in addition to exceeding the forecast at the present rate, we are successful also in availing ourselves of any part of this heretofore competitive business, we may be called upon to supply an additional half-million pounds to new trade throughout the ensuing ten months to the end of the year."

The Government offers in evidence Government Exhibit 421 at page 5638. This is an appropriation request dated 6/8/29.

4649 (The appropriation request dated 6/8/29 was received in evidence and marked "Government Exhibit No. 421.")

Mr. MIXICUS. Reading the second paragraph appearing on page 5638:

"This project is submitted for authorization to extend the Old Hickory Cellophane Plant making it a full sized unit having eight casting machines. Four casting machines have been authorized to date, and are now being fabricated and installed."

Turning to the next page, 5639, at the top of the page, I begin reading:

"Sales of cellophane have been greatly exceeding sales forecast; for example—May forecast was 375,000 pounds, and actual sales was 400,000 pounds. This is at rate of 5,700,000 pounds per year and does not represent peak monthly sales. According to past experience, the first six months of the year represents 40% of cellophane sold and the last six months of the year represents 60%. The peak sales occurring in the Fall.

"New lines and uses of cellophane are coming up rapidly.

"With this rapidly increasing trend of cellophane sales, it is highly probably that authorized and installed production facilities will be unable to meet the sales demand for cellophane."

4650 Skipping to a full paragraph just below the middle of the page headed "Fabrication of Machines":

"All our casting machines have been built in the shops of the E. I. duPont Nemours & Company in Wilmington, Delaware. Special jigs, tools, molds have been developed. Outside fabricators do not possess the facilities and it is not desirable that they have them."

The Government offers in evidence Exhibit 422 appearing at page 5641. This is a letter from Mr. J. E. Hatt, General Manager, to Mr. F. G. Hess, Secretary Executive Committee, dated June 18, 1929.

(The letter from Mr. Hatt to Mr. Hess dated June 18, 1929 was received in evidence and marked "Government Exhibit No. 422.")

Mr. MIXICUS. (Reading.)

"Subject: SALES POSSIBILITIES 1929-1930.

"In an effort to provide certain details regarding Cellophane sales in the immediate past and also future two years, the following information is submitted:

"*Cellophane Sales (written in pencil)*

	First five months Sales	Twelve months Sales	Five months—Percent of whole year (written in pencil)
	Pounds	*Pounds*	
"1927	630,600	2,005,400	31½%.
4651 "1928	1,058,200	3,082,800	34%.
"1929	1,826,000	5,400,000 (x) (in pencil)	34% (in pencil) (x).

"(In pencil (x) estimated.)

"The first five months' 1929 gain over the previous year is about 73% (?). If this rate of gain continues throughout the entire year 1929, the sales will approximate 5,200,000 pounds, which will be a fairly close approximation of all we can produce with the present equipment, and with the operation of such parts of the additional equipment now authorized, as will be in operation in 1929 (4 casting machines at Old Hickory) (in pencil).

"If we meet our schedule of installation of these machines, and have the resulting product therefrom, our sales for the current year may approach 5,400,000 to 5,500,000 pounds. If we reach the 5,400,000 figure, it will practically mean an 80% increase in 1929 over 1928.

"For the past several years, the first six months of the various years as shown from 40 to 42% of that total calendar year's business. Our first six months' volume in 1929 will be approximately 2,300,000 pounds, and if that should prove to be 40% of the year's business, our total sales would approximate 5,750,000, which represents, perhaps, the maximum production that we could obtain, considering the operation of the new machines at Old Hickory making what production they can, available for 1929.

4652 We are, therefore, fixing a 1929 year's business that, for forecasting purposes, may be estimated at 5,400,000 pounds.

"If we are fortunate enough to accomplish in 1930, the same percentage of increase over 1929 that this estimated 1929 figure represents over 1928—namely 80%—we will be called upon to deliver 9,750,000 pounds in 1930. It would be difficult to get any more than that amount out of sixteen machines in operation for 12 months—allowing for the necessary maintenance work on various of these machines from time to time throughout the year.

"A better basis of operation with sixteen machines erected would be to operate fourteen of them continuously—having one machine down at all times at each plant for repairs, overhauling, mainte-

nance, and emergencies, and providing a small additional source of capacity, if and as required.

"Figuring fourteen machines for 12 months' operation, the maximum productive capacity on that basis would be 9,200,000 pounds annually. A 70% increase over estimated 1929 sales of 5,400,000 pounds will consume that quantity.

"For the five months to date this year, our gain over 1928 has been (in pencil—about 73%) and by the end of June, or to make that the six months' period, our gain over 1928 will undoubtedly be 80%. While we are not at all certain that we can continue
4653 at this rate, yet the possibilities of this field are not by any means accomplished, and so we feel that forecasting the necessity to be obliged to produce a 70% increase in another year is not at all out of line with present activities. For this reason, therefore, we believe that the completion of construction of a total of sixteen machines early in 1930, as per schedule, is fully justified, and it may be that after another month or two, if the present level of volume continues, we shall be obliged to recommend further proposed construction running into 1930.

"While May, 1929, was in itself, unusual in relation to the earlier months of this year, we feel that the volume attained in that month has been due to our policy of consistently lower prices, the introduction into new fields of uses, the success in acquiring some previously competitive business due in considerable measure to the customs situation, and to the further development of Moisture-proof Cellophane, particularly for cigar and cake uses."

I shall now skip to the final paragraph of the letter, your Honor:

"In view of all this, I feel, therefore, that it is not at all unlikely that our 1930 calendar year's volume will approximate 9,000,000 pounds, barring an unusual business situation in the United States and in view of the fact that the growth possibilities of this business are not yet attained and considering the
4654 necessity of having production ahead of sales, it would seem most advisable to have authorization for the machines now asked for—representing a total of eight at Buffalo and eight at Old Hickory—sixteen machines in all."

The Government offers in evidence Government Exhibit 424, appearing at page 5646.

(The letter from Mr. L. A. Yerkes, General Manager, Rayon Department, to Executive Committee, dated May 8, 1939, was received in evidence and marked "Government Exhibit No. 424.")

Mr. MINICUS. The heading is "Cellophane Film Expansion."

At the first paragraph I commence reading:

"As J. E. Hatt's letter, attached, states, our anticipated forecast for 1940 sales is 80,000,000 pounds, while our rate of produc-

tion by the end of 1939 will be 81,000,000 pounds, after adding 5,000,000 pounds by an expenditure of around $375,000 for which project will be submitted shortly. We are, therefore, faced with the necessity of having additional capacity available by the spring of 1941 if our forecasts of future growth are correct."

Skipping now to the first paragraph, page 2 of the report, 5647, I commence reading:

"In spite of the fact that Cellophane is more vulnerable from a competitive standpoint as the years go on, it seems as if
4655 the best guess would be that Clinton expansion would continue to at least 16 machines, and on this basis we would recommend looking forward to presenting you with an estimate toward the end of this year for an 8 machine plant to be located at Clinton to be ready by 1941."

* * * * *

4668 FRIDAY, FEBRUARY 9, 1951, 10:30 O'CLOCK A.M.

Present: As before noted.

Mr. MINICUS. We concluded yesterday at just about the end of the discussion of certain statements that appeared in the defendant's documents relating to the intent accompanying policy discussions surrounding the problem of expanding the corporation's productive facilities. It is the Government's position that these statements of intent show that very often in considering expansion of their productive facilities the defendant considered the effect upon other producers and people outside the industry who might consider entering into the manufacture and sale of these products and how they would be affected by these contemplated expansions.

Beginning this morning I invite the Court's attention to one particular illustration of this matter. Commencing in or about 1945 the defendant corporation had under consideration the establishment of a West Coast manufacturing plant for the production of cellophane. It is the Government's contention that the anti-competitive intent which we say very often accompanied their expansion programs is very well illustrated in this particular situation.

The Government offers in evidence Government Ex-
4669 hibit 150 appearing at page 463.

(The letter from T. L. Hines, General Assistant Manager, to Mr. H. J. White, Assistant Manager, Rayon Department, dated February 2, 1945, was received in evidence and marked "Government Exhibit No. 150.")

The COURT. Could I have the sentence just prior to the last read?

(The reporter read as follows:)

"Beginning this morning I invite the Court's attention to one particular illustration of this matter. Commencing in or about 1945 the defendant corporation had under consideration the establishment of a West Coast manufacturing plant for the production of cellophane. It is the Government's contention that the anti-competitive intent which we say very often accompanied their expansion programs is very well illustrated in this particular situation."

The COURT. In other words, it is your thesis that in this case the normal business function to expand was not normal, but was accompanied with an intent to illegally monopolize?

Mr. MINICUS. I don't think, your Honor, we go so far as to say it was abnormal. The fact——

The COURT. I don't say abnormal. What I want to know is do you say this expansion was different than orthodox expansion among business men in general? I am trying to get your distinction. I am having difficulty getting the distinction.

4670 You say any expansion, or at least you said yesterday, expansion per se is not condemned; but expansion accompanied with intent is different. That is why I had the reporter read this back to me this morning. I haven't quite got the distinction you are making.

Mr. MINICUS. There are three factors involved, I think, your Honor. The first is the expansion; the second is the accompanying intent, the constant consideration of what effect this expansion is going to have upon existing competition and upon those who may be considering entering the industry.

The COURT. Doesn't that consideration of necessity have to be taken into consideration by any business man?

Mr. MINICUS. That is very true. The third, I believe, your Honor, is the distinguishing factor.

The COURT. Yes?

Mr. MINICUS. And that is the defendant's dominance in this industry.

The COURT. All right, let us go on.

4671 Mr. MINICUS. I believe I have offered Government's Exhibit 150 in evidence. This is a letter from T. L. Hines, General Assistant Manager, to H. J. White, Assistant Manager, Rayon Department, E. I. duPont de Nemours & Company, February 2, 1945, is the date. The final paragraph on page 464 reads as follows:

"Our past sales indicate that the business logical to the West Coast plant, including export, will normally run approximately 10% of our total sales volume. Should this hold in the future, a sales volume sufficient to reach the 24,000,000 pound capacity

figure of an eight machine plant on the West Coast would not be obtained until our total volume was approximately 240,000,000 pounds against our total forecasted sales for the second year postwar of 130,000,000 pounds."

This document is simply introduced to demonstrate the quantity of business then available and anticipated on the West Coast in relation to the company's total production.

The Government offers in evidence Government's Exhibit 149 at page 460. This is a letter from Mr. H. J. White to Mr. L. A. Yerkes, dated February 7, 1945.

(Letter from Mr. White to Mr. Yerkes dated February 7, 1945, was received in evidence and marked "Government's Exhibit No. 149.")

4672 Mr MINICUS. Reading the last two paragraphs on the second page of the letter, beginning at page 461:

"From the estimated cost at the two locations, it is indicated that the construction of a West Coast Plant could be justified only on the basis of broad policy considerations.

"Mr. Hines points out the desirability of going ahead with the proposed Clinton expansion regardless of a decision to build on the West Coast. The design on the Clinton expansion is approximately 40% completed and it is considered necessary to make this addition in order to take care of the Post-War Sales forecast."

The remainder of the document considers the merits of expanding a then existing plant at Clinton, Iowa, and beginning construction of a new plant on the West Coast to take care of the West Coast business. I think the document quite clearly shows that business-wise most of the merits are with the expansion of the Clinton plant.

The Government offers in evidence Exhibit 95 appearing at page 380. This is a report from the Rayon Department of the defendant corporation to its Executive Committee.

(Memorandum from Rayon Department to Executive Committee, E. I. duPont de Nemours & Company, dated February 22, 1945, was received in evidence and marked "Government's Exhibit No. 95.")

Mr. MINICUS. I commence reading at the fourth paragraph on the second page, at page 381:

4673 "Sales Forecast: The geographical Sales Territory served by a West Coast Plant comprises the area west of Denver, to which freight charges on shipments from Clinton exceed freight charges on similar shipments from a plant located near San Francisco. This Pacific Coast territory comprises the seven States of California, Oregon, Washington, Nevada, Utah, Idaho and Arizona. An approximate 70% of the sales are in

the State of California alone, and close to 90% in the States of California, Oregon and Washington.

"Experience over the past five years shows that total West Coast sales averaged 6,500,000 lbs. annually. This includes sales to Jobber, Converter and Direct.

"The Cellophane Division has set up Export Shipments to Countries that would logically be served from the West Coast. Past experience for the above five-year period of shipments to these selected Export Countries has averaged approximately 1,910,000 lbs. annually. This average does not include shipments to important countries such as Brazil, Argentina, etc. that can be made more logically from our Old Hickory Plant. This 1,910,000 lbs. represents 46% of our total average yearly Export shipments to all points of 4,100,000 lbs.

"Combining the total West Coast sales and the logical exports from a West Coast Plant, represents an average over the above period of about 8,400,000 lbs. per year, which is a little over
4674 9.0% of our total average Cellophane Sales of 93,000,000 lbs. per year for the same period."

Skipping now to the fourth paragraph on the next page, I commence reading:

"There is no question that reasonable increases in Cellophane production capacity can be obtained cheaper with a better return on investment at our present locations than in a West Coast Plant. This is also an important consideration from the competitive point of view.

"It seems to follow from the above that we should not be unduly concerned if a competitor established a plant on the West Coast. It might result in our having to increase Cellophane Warehousing facilities either through the utilization of existing Zellerbach Warehouses, or providing for additional warehouse facilities in some other manner."

I will not read the next paragraph and I move to the final paragraph in the report:

"In the last analysis then, it is indicated that whether or not to construct a West Coast Plant becomes a matter of broad policy for your Committee to consider."

4675 The Government offers in evidence Government Exhibit No. 96, appearing at page 383. This is a letter from Mr. Walter S. Carpenter, Jr., President, to Mr. H. J. White, of the Rayon Department, dated March 29, 1945.

(The letter from Walter S. Carpenter, Jr., President, to Mr. H. J. White, Rayon Department, dated March 29, 1945, was received in evidence and marked "Government Exhibit No. 96.")

Mr. MINICUS. I commence reading the final paragraph on the first page at page 383:

"I think to decide this question on the basis of your report of February 22, we must reach the conclusion that we should not locate our next extension in plant capacity on the west coast in preference to Clinton. There are, however, I think two other important aspects to take into consideration.

"If, by failing to establish a plant in the west coast section some other producer, encouraged by this lack of interest on our part should do so, they might make inroads into our business in that area which would be very difficult to recover. I presume that it is not inconceivable that if some other manufacturer was encouraged to do this, he might be able to shift our present distributor in that area to the sale of the production of his local plant, or conceivably, he might even interest our present distributor in participating with him in the ownership of such a plant.

4676 "The second point is that the increase in the construction cost of the west coast plant as compared with Clinton may not represent in fact a real increase in capital investment but may merely be the anticipation of this increased cost, which we will have to incur, in any event, two or three years hence after the advantage gained by the enlargement of the Clinton plant has been absorbed by increased sales. On this basis this loss, by constructing the west coast plant now as compared to three years hence, may merely be the loss in interest on this excess construction cost, and in view of present low interest rates this is, in fact, quite a small item."

At this point we have apparently Mr. Carpenter in disagreement with the conclusions of the officials of the Rayon Department who are favoring an abandonment of the idea of a west coast plant. Mr. Carpenter is not in agreement, but is at least pointing out the consideration of the effect upon competition.

Mr. GESELL. He says in the exhibit that he agrees with their report and the best place to do it is Clinton if it is not for these considerations, and Clinton is where it was done, not the west coast.

Mr. MINICUS. I point out to your Honor the first paragraph on page 2 of that report says one of those considerations is very definitely the effect upon competition.

The COURT. Where is Clinton?

4677 Mr. MINICUS. Iowa. I have estimated it is about between 100 or 150 miles south of Chicago.

The Government offers in evidence Government Exhibit 110, appearing at page 406. This is a letter from Mr. T. L. Hines to Mr. H. J. White, dated November 28, 1945, and is titled "Comments on the West Coast Survey."

(The letter from Mr. T. L. Hines to Mr. H. J. White, dated

November 28, 1945, was received in evidence and marked "Government Exhibit No. 110.")

Mr. MIXICUS. The final paragraph at page 1 on 406 reads:

"In the not too distant future we look forward to about 50% of our total volume passing through the hands of converters. Three of our largest converters now have plants on the West Coast. As long as we maintain our present relations with these converters I feel that they will look upon us as their major source of supply whether we have a plant on the West Coast or not, and the question has been raised as to whether the people in California would prefer to buy film manufactured in Oregon rather than that manufactured in Iowa."

The Government offers in evidence Government Exhibit 158 appearing at page 479. This is a report from the Rayon Department to the Executive Committee, dated November 29, 1945. It is headed "West Coast Plant."

(The report from the Rayon Department to the Executive
4678 Committee dated November 29, 1945 was received in evidence and marked "Government Exhibit No. 158.")

Mr. MIXICUS. I commence reading:

"On April 4, 1945 your Committee considered a memorandum from the Rayon Department in regard to a West Coast Cellophane plant.

"The preliminary estimates indicated that such a plant, with a capacity of about 14,000,000 pounds, would require an investment, including working capital, of 52¢ per pound with a return of 13.4% after 40% taxes, as compared with an investment of 38¢ per pound and a return of 25.3% to build and operate an addition at Clinton, Iowa."

Moving to the last paragraph on the same page:

"The financial aspects of the proposal are not inviting. The combination of Cellophane and 'Cordura' tire yarn facilities decreases somewhat the required investment for Cellophane but makes the return on the combined investment less attractive than for Cellophane alone."

Then follows a chart which I shall not read showing the statistical comparisons.

[Reading:] "The West Coast proposal should also be considered in the light of over-all Cellophane expansion plans. In view of the revised Cellophane sales forecast for the second postwar year, which now indicates a total sales potential for duPont
of 169,000,000 pounds for that year, we have revised
4679 upward our plans for Cellophane capacity from an annual output of 136,000,000 pounds to 165,000,000. This will be accomplished principally through increased casting machine

speeds at existing locations which have recently been demonstrated as practical."

The Government offers in evidence Government Exhibit No. 100, appearing at page 389. This is a memorandum from Mr. Walter S. Carpenter, Jr., to Mr. B. M. May, dated May 2, 1946.

(The memorandum from Walter S. Carpenter, Jr., to Mr. B. M. May, dated May 2, 1946, was received in evidence and marked Government Exhibit No. 100.")

Mr. MINICUS. I commence reading——

Mr. GESELL. You are not contending it relates to cellophane, are you Mr. Minicus? It relates to tire yarn and staple.

Mr. MINICUS. I think this could be answered in a more orderly manner if Mr. Gesell would address himself to the Court and reserve his comments until I am through; but if we are going to discuss each document as we come to it it will delay matters.

I will point out in the previous document——

The COURT. Do you want to heed that admonition, Mr. Gesell?

Mr. GESELL. No, your Honor. I think I should rise to address the Court on some point of substance.

4680 Mr. MINICUS. I invite the Court's attention to the previous exhibit, Government Exhibit 158, which was dated November 29, 1945. The final paragraph on the first page reads:

"The financial aspects of the proposal are not inviting. The combination of Cellophane and 'Cordura' tire yarn facilities decreases somewhat the required investment for Cellophane but makes the return on the combined investment less attractive than for Cellophane alone."

It shows that at that time undoubtedly the company was still considering a west coast plant and then had under consideration combining rayon and cellophane in that west coast plant. The exhibit I shall offer after Government Exhibit 100 shows at the very time of this letter the same situation existed.

4681 Mr. MINICUS. I would like to read Government's Exhibit 100:

"You have, of course, seen that American Viscose has taken over Sylvania." I think that applies to cellophane. Continuing: "I expect this will probably mean a much more aggressive policy on the part of that Company.

"Does this situation make you feel any differently regarding the wisdom of a west coast location for tire yarn and staple? I think we should try as best we can to look into the future in connection with this problem and not to be guided too fully by the mathematics of the current position. Maybe it's wise or maybe it's not—but it is certainly important."

Now, I think, if we consider the previous exhibit and the fact that this memorandum is headed by the fact of the American

Viscose Company taking over the cellophane facilities of Sylvania, it is quite apparent that they are also talking about cellophane in this case.

The Government offers in evidence Government's Exhibit 99, appearing at page 388. This is a letter from B. M. May to Mr. Walter Carpenter, Jr.

Government's Exhibit 99

(Letter from Mr. May to Mr. Carpenter, Jr., dated May 10, 1946, was received in evidence and marked "Government's Exhibit No. 99.")

Mr. MINICUS. It reads:

4682 "In answer to your note of May 2nd on the subject of a West Coast Plant for cellophane and tire yarn or for cellophane alone, recent events affecting our competitors have not altered the view or conclusions of this Department as contained in our report of November 29, 1945 to the Executive Committee."

I think this quite definitely shows that the previous exhibit also related to cellophane.

Continuing the reading:

"We here all feel that the future probably holds promise of industrial expansion in that area, but any near term returns that could be made do not justify a recommendation. We take it that this comes in the category of what you refer to as the 'mathematics of the position'. These are against it on the basis of expected returns. On the question of making an investment for policy reasons or future expectations, that is another thing and one upon which the Department is 'watchfully waiting'.

"Other things bear upon the considerations. We are confidently looking for significant advances in the productivity of cellophane plants. This would, of course, mean heavy expenditure for their revision. We are now studying the possibilities of expansion at Spruance Rayon, the preliminaries of which look attractive. We have two other fibres, 'A' and 'V', under semi-works and

4683 laboratory investigation, which may conceivably affect our attitude toward the cellulose based fibres.

"We recognize the importance of watching these developments but if there is a feeling that in the broader view a West Coast undertaking is advisable, a cellophane plant, at least, can pay its way but not on a very attractive basis."

I have now, your Honor, three documents relating to the expansion of the duPont Company in the fields of caps and bands, which I shall not read but will offer into evidence. The Government offers into evidence Government's Exhibit No. 428, appearing at page 5659.

(Letter from Mr. Hines to Mr. Hess dated April 23, 1935, was received in evidence and marked "Government's Exhibit No. 428.")

Mr. MINICUS. The Government offers in evidence Exhibit No. 178, appearing at page 507.

(Memorandum from Mr. Hines to Mr. Fisher, dated November 26, 1945, was received in evidence and marked "Government's Exhibit No. 178.")

Mr. MINICUS. The Government offers into evidence Government's Exhibit 176, appearing at page 505.

(Memorandum from Mr. Hines to Mr. Fisher dated May 9, 1946, was received in evidence and marked "Government's Exhibit No. 176.")

4684 Mr. MINICUS. Now, on this matter of expansion, I would like to clarify, as much as I can, the Government's position with regard to the market. We believe that the earlier documents under this heading very definitely establish duPont's dominance in the implements of production, and there are other documents that have been marked for identification that are designed to further support that position. In other words, we claim that from the point of view of relative factories between this defendant and the entire remainder of the industry, that they are overwhelmingly dominant. The same thing applies to the number of spinning machines they own. In all of the facilities that this defendant has brought within its control, built up through its own investment, it is far and ahead of the remainder of the industry.

We further maintain, and we believe the earlier documents under this heading have shown, that duPont in approving and appropriating money for this new construction anticipated, sometimes years in advance of its actual happening, what the demand would be in the future.

We also believe that duPont had unusual means of accurately forecasting this demand. We believe that that is shown particularly by Government's Exhibit No. 12, which was introduced in evidence yesterday, where they forecast at least three and maybe more years in the future that they would ultimately have potential demand of 270,000,000 pounds. Then the next statement
4685 says, "Assuming that Sylvania is able to achieve 25 per cent of this, that would leave us so many pounds."

Now, the ability to do that is quite an unusual thing in any industry.

The COURT. Well, should that demonstration of industrial talent be penalized as such?

Mr. MINICUS. I don't think, your Honor, that this is a question particularly of industrial talent. It is the market structure that

gave them the ability to forecast, the unusual market structure, the duopoly situation in this industry that I have spoken of before, which is a very rare thing in any industry, when a dominant——

The COURT. Why, the Ford Motor Company has been doing it for years.

Mr. MINICUS. They have had a great deal of competition from a great many other motor companies.

The COURT. We are not talking about competition. I am talking about one particular set of circumstances, namely, business forecast, and I say if you demonstrate that you have an unusual ability along that line, I ask you, should it be condemned?

Mr. MINICUS. Well, it is not the Government's position that this is the result of unusual ability but the result of very unusual market circumstances.

The COURT. Well, keep on as to this point.

Mr. MINICUS. Furthermore, your Honor, we are shift-
4686 ing our sights again to this question of intent. All the Government is intending to show here is intent, and I am going to make that clear.

The COURT. Remember when I came out this morning I said that I cannot get this intent that you are talking about. I have not yet. I am sorry. It is my fault, I suppose.

Mr. MINICUS. Let me put it this way, your Honor. We have two alternative positions before the Court. One is our claim——

The COURT. Before you start shifting, let me get the first one. Well, I better stop talking and let you talk. You go on.

Mr. MINICUS. The first is our claim that by the sheer fact of this defendant's dominance in this industry plus the powers that we will show are attendant upon that dominance, that by proof of those factors we have alone established a prima facie case of violation of the law under Section 2.

However, there is one other consideration. It is true that size alone is not a violation of Section 2. But when we can illustrate that that dominant position and the powers attendant upon it were not the result of happenstance, as I said the other day, that this company did not achieve this position because it had no ave-
nue of escape, that it was thrust upon them—if we can
4687 negative that, then under Judge Learned Hand's opinion in the Alcoa case we have brought them within the zone of violation of the Sherman Act.

I shall show in a moment the manner in which Judge Hand handled that point, but our position is that when a company continues to expand to take up any slack which may develop between demand and supply, and double and redouble its capacity so that there is never any excess, or never intended to be any

excess demand, the natural effect would be to crowd others, or discourage others from entering into that industry. And we believe that the documents here have expressly stated——

The COURT. Well now, to take the converse of your proposition, it is your thesis that there should have been a curtailment of production by duPont, a restriction of production, a tightening in of production when there was a public, as you say, growing demand for the product, that they should have done nothing to expand? I just do not get it.

Mr. MINICUS. One of the issues in this case, your Honor, is whether they intended to achieve this position——

The COURT. We have got 100,000 people in New York City and they want cellophane and they say to duPont, "Look, why don't you open another plant so you can get us cellophane?" You say, no, they should not have done that, and I am having difficulty interpreting that in terms of a layman, without speaking legalistically or interpreting the anti-trust laws. I am trying
4688 to look at the sound common sense of it. It just does not come into focus with me.

Mr. MINICUS. This of course, your Honor, is part of the entire pattern of the case. We are simply trying to show here that this did not occur, this position in the industry that we are presently talking about——

The COURT. Well now, the whole of your case cannot be any greater than the sum of its parts.

Mr. MINICUS. That is very true.

The COURT. And I have got this part before me now and I am having difficulty with it.

Mr. MINICUS. May I read to you Judge Hand's opinion on this particular part of the case? It is on that precedent that we have based this point. I have the short section with me.

The COURT. Yes.

4689 Mr. MINICUS. This appears at page 430 of Judge Hand's opinion:

"It would completely misconstrue 'Alcoa's position in 1940 to hold that it was the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces. Already in 1909, when its last lawful monopoly ended, it sought to strengthen its position by unlawful practices, and these concededly continued until 1912. In that year it had two plants in New York, at which it produced less than 42 million pounds of ingot; in 1934 it had five plants (the original two, enlarged; one in Tennessee; one in North Carolina; one in Washington), and its production had risen to about 327 million pounds, an increase of almost eight-fold. Meanwhile not

a pound of ingot had been produced by anyone else in the United States. This increase and this continued and undisturbed control did not fall undesigned into 'Alcoa's' lap: obviously it could not have done so. It could only have resulted, as it did result, from a persistent determination to maintain the control, with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but 'Alcoa' effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could
4690 supply what it had evoked. There is no dispute as to this: 'Alcoa' avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent."

4691 Now I would like to point out to your Honor that in that case all that Judge Learned Hand had on the record to work with was the simple fact that this company expanded, doubled and redoubled its production. He didn't even have the statements to work with I have given the Court in this case.

The Court. You don't have to answer this question unless you want to, Mr. Minicus: Do you think that legal brakes should be put on productivity in our economic scene?

Mr. Minicus. I think they are justifiable, your Honor, when we have a position of control in any particular industry which is within the scope of Section 2 of the Sherman Act, and where

that expansion by that particular unit will only decrease the degree of control which the law and the courts have held to be violative.

Judge Hand's position is quite clear.

The COURT. I am having difficulty with a proposition that if you have the power and the potention to produce you can't do it if you happen to find yourself in a position where you are either in the 60, 70, 80, 90 or 100% bracket as far as your share of the market is concerned.

Mr. MINICUS. Well, one of the problems——

The COURT. Let me pose this suppositious case to you. Suppose you have a business, Mr. Minicus, and you have 95% control of the market. You do nothing to acquire that which meets
4692 with the disapproval of the Department of Justice. Now, you say you can't get 95% or 97%, although there is a crying need for it by public consumption; is that right?

Mr. MINICUS. That is not our position, your Honor. You have made one qualification in there that verges on this very point. You said if you do nothing to acquire it. In other words, if that position had been thrust upon you. If you had a patent that was absolutely valid and the day after that patent expired you had that controlling interest in the industry, then we along with Judge Hand say that the monopoly position and the control has there been thrust upon an owner.

The COURT. Well, the only comment I make about Judge Hand is that his statements are ex cathedra. I can't follow his reason as he develops his reasoning. He just said so.

Mr. MINICUS. Judge Hand said we will look at the entire situation. We will add up all these elements that go into the generation of monopoly power, and we must find out whether or not it is true that this company did nothing to achieve this position, and that is the distinguishing point your Honor made in his own statement, that you do nothing and get 96%, and Judge Hand——

The COURT. Well, of course, you don't do nothing. You don't sit and hibernate in a zoo. I didn't mean that. Of course, they perform normal business functions as any company does to sell its product.

Mr. MINICUS. That is very true but is it a nor-
4693 mal business function when this expansion is expressly stated to be for the purpose of frustrating the entry of newcomers into the industry and suppressing the existing competition? And those statements are in the exhibits.

The COURT. If that is the intent, there is no other answer to it, if that is the intent.

Mr. MINICUS. I think this correspondence most definitely shows——

The COURT. What interests me is a certain corporation feels the business pulse and it says, "My prognosis is that for the next two years we are going to have to have X pounds of our product, and I think we can sell X pounds. Well, we haven't enough plants. That is all right; we will build one to meet that public demand." You say that in and of itself when it has the effect of perhaps retarding others from coming into the competitive field, those simple acts which I recited, are illegal?

Mr. MINICUS. If we accept the position that the policy basing the Sherman Act is to avoid concentrations of economic power——

The COURT. Well, you persevere, Mr. Minicus. You may convert me on that proposition.

Mr. MINICUS. I would like to submit to your Honor that there are a great many things going to be presented to the Court in this case that are only colored by the fact
4694 of the defendant's dominance; that a corporation doing these things having, 30, 35 or maybe 40%—I don't know where the line is to be drawn, and I don't think anybody has drawn it yet—doing these things you can draw no inferences from it, but when a dominant unit in any industry such as this one where there are only two operating——

The COURT. In other words, it seems to me here is what we do: We crystallize the question this way: "When the Clinton plant was planned was it the intent to sell cellophane to meet a public demand or was it to tighten the strangehold on Sylvania? That is the way you put the problem, and you say it is the latter.

Mr. MINICUS. No; I say it was among the considerations. I don't say that they built additional plants only to discourage new competition, but I say that it is going to have that inevitable effect, and in this case we can show that they considered it, which was not even shown in the Aluminum case; and that if we permit this sort of thing to continue, as Judge Learned Hand said, the Act will be emasculated. If we are going to permit such dominant corporations to expand and expand every time there is a new area of demand opened up, have them move in and fill it up, the evil of the violation will only be concentrated that much more. There will be no end to it and the Act will be emasculated. After all,
the purpose of Section 2 of the Sherman Act is to dissolve
4695 that kind of economic power. If it continues we will finally have great concentrations of industry and there can be no dissolution of it. One of our purposes here is to get this thing before it goes too far. But reducing this to its ultimate distillation, the only purpose is to negate any defense that this position of great power and dominance in this industry was thrust upon the defendant, that they could not have done anything to avoid it, and that is all the point is meant to show.

The COURT. You did not conclude C and D under 4, did you?

Mr. MINICUS. No, sir, I have not.

Mr. GESELL. In view of the discussion we have been having I thought that the best thing for me to do would be to start in the middle of the documents that relate to this capacity question and deal with them and the Aluminum Company issue first. That starts at 419, at page 5633. Then later in my discussion I can pick up some of these earlier documents that were discussed yesterday.

We seem to be bringing the Aluminum case into focus a bit, and I would like to talk about that first off.

I don't know what Mr. Minicus or what Judge Hand meant when he talked about a "passive monopoly", but if there is any question in anybody's mind that du Pont is contending that it occupies the position it does in the manufacture and sale of Cellophane
4696 just because it sat quietly by and had somebody put it in its lap, they are mistaken. It was the result of hard work, the risk of capital, great initiative, great industrial skill, and great research skill. There is no issue here as far as duPont is concerned that somebody came in and put the cellophane business in its lap and it just grew like Topsy and nobody did anything about it. That is a false issue—one created apparently because of the Government's great desire to prove its prima facie case. It is not an issue that we tender, your Honor.

What about the Aluminum case? What I would like to do is present in fairly brief form our views as to the distinction between this case and that case. In the first place, Judge Hand found that the Aluminum Company up until 1912 conducted itself as a flagrant violator of the Sherman Act. We say our start in this business was lawful and proper. I recognize that that is an issue that is tendered here. Were those basic, joint venture contracts at the time we entered this business valid and proper businesslike arrangements or were they in some way tainted by the Act? But if our position is correct, and I believe your Honor will so conclude at the conclusion of the evidence, there is the first distinction. Aluminum started illegally; cellophane started legally.

Mr. MINICUS. I object to that, your Honor. There is no evidence that Aluminum started illegally, and my contention is that Aluminum did not start illegally. Back before 1900
4697 under the Hall patent there was a product patent on aluminum that the Aluminum Company got control of, and the opinion I read said, I believe, until 1907 the monopoly was lawful.

Mr. GESELL. As usual, you only had part of the opinion read to you.

At page 422 and 423 the Court said specifically that the position of Aluminum between 1909 and 1912 was perpetuated by unlawful practices that had been forbidden by a decree.

Mr. MINICUS. I refer Mr. Gesell to the joint——

Mr. GESELL. I was very quiet on his argument, your Honor, and I do suggest——

The COURT. I think that is right.

Mr. GESELL. It was hard to be quiet.

The COURT. I don't know whether I agree with that last statement.

Mr. GESELL. Hard for me, your Honor.

The COURT. I think Mr. Gesell has his right to give his interpretation of Judge Hand's opinion in the Aluminum case as he sees it. On the first challenge he has gone to the case and he is reading me the language. Have no fear; don't think I will be misled, Mr. Minicus. I think if you wait until Mr. Gesell finishes then we can hear from you again. We have all day.

Mr. MINICUS. I agree with your Honor.

4698 The second distinction, your Honor, and one that I keep pressing here is that in the Aluminum case the patents expired way back before the First World War. In this case a valid, incontestably valid product patent on the major product of cellophane manufactured, which is the core of the industry, was in force and effect owned by duPont as the result of its own invention up until a few months before the case was brought.

It is now permissible for me to observe what I tried to say yesterday, that the moistureproof is 85 per cent of duPont's business because the figures are now in, and I assert again what I said before, that that was covered by a valid product patent.

The third question that is present in applying the Aluminum doctrine and that results in distinctions that have to be drawn between aluminum and cellophane is the question of the market and the question of the percentages involved. In the Aluminum case we were dealing with a 90 per cent situation after that market had been analyzed and its scope determined by the Court. We say, of course, the market here is a different market in which we have but 20 per cent. But let us take the Government's market, the cellophane market. We don't have 90 per cent. We have a percentage in the 70's, which, when all the proof is in, is going to show is steadily declining, and we have a competitor which Aluminum didn't have, a substantial competitor, and we

4699 have another one coming in and about to put up his plant.

So we are different there as to trends; we are different there as to percentages; and we are different there as to market.

The next distinction—and this one is quite germane to these documents, as I see it—is that in the Aluminum case, in the por-

tions which were read by Mr. Minicus, it is my view that Judge Hand is talking about the Aluminum Company having installed capacity which was in excess of the requirements in the market and then going out and stimulating uses in order to operate that capacity, a sort of overhanging capacity above the industry for which uses were to be stimulated, whereas here, as I will show you as we go through the documents, duPont's capacity never caught up with the demand. The demand was more than it could fill, and there was plenty of room for others to manufacture had they the initiative and the nerve and the industrial capacity to do it.

Finally, your Honor, I come back to what I have constantly said to the Court, that these are issues of fact and that the facts of the cellophane business and the cellophane market and how it is conducted must be viewed as such, and this effort of Mr. Minicus to cut cellophane to fit his Procrustean Aluminum bed is not going to work. They are wholly different situations and we must judge it on the different facts.

I would like in discussing the capacity to turn to
4700 the complaint, because there I think we have the focusing of the capacity issue in the way that we understood it was to be focused. I call your Honor's attention to paragraph 22 (b), which is the charging paragraph concerning the control of supply, and then to paragraph 24, which is the important paragraph and I think it is the heart of the capacity charge, and finally to 36, at the very end of 36, where it is alleged that duPont expanded its facilities from time to time for the purpose of anticipating and discouraging new competition. All of those paragraphs and others in the complaint hold the issue of intent, and it is as to that that I think these documents should be focused.

What was duPont's intent? What does that mean? We start off with the concession from Mr. Minicus that the conduct was lawful. We start off with the second concession from him that there were many reasons why this was done that were proper reasons, but he says that in spite of the fact that the conduct was lawful and it was motivated by many different reasons, we did consider on occasions the competitive implications of what we were doing, and because we considered them, because we mentioned them, because in a competitive business we thought about the existence of and thought about our competitor and talked about him, that that taints the whole situation.

I say the only intent that the Sherman Act talks about
4701 and the only intent your Honor could look at is, was there a clear, definite, primary intent to exclude underlying these

capacity increases? And we will not find anything approaching that.

One would have thought that if we had that kind of a situation in a typical monopoly case we would have found discussion in these documents along this line: "While we don't think we are going to need this capacity for the next ten years, wouldn't it be a good idea to build a plant with eight machines so that if any new person comes along, or anybody wants something we can't supply, we can just turn the machines on and beat the new fellow in the business." There is no talk about that at all. These are business documents concerned with, is it a desirable, practical thing to do, to put in this expansion or that expansion? Is it going to pay a decent return on investment? Do we think as business men we are going to be able to sell the result of the product? How is that going to be influenced by what our competitor does? Are we going to lose some markets to him that will affect what we sell? Should we put it into the existing facilities and save some costs or are those facilities such from the point of view of cost or location that we ought to go out at this time and put new facilities up somewhere? And what is it going to cost if we do it one place, and what is it going to cost if we do it another place? And these
4702 come up to the Executive Committee of the company from the operating people. They are reviewed, discussed and acted on in a public, straightforward, reasonable business way.

It seems to me there is another consideration here, your Honor. Here is a situation where duPont is exploiting a patented product. And here is a situation where on the Government's own evidence it is clear that this is a product that is wanted and needed and of importance to consumers. Now, wasn't it the purpose of the patent statutes, wasn't it the purpose of the Constitution that he who invents a new and useful idea should develop it in a productive way; should seek to improve its quality, should seek to improve its costs, should seek to broaden its sales and promote the sciences and useful arts? Or was it the notion that while we had the legal power to exclude anybody from this business, we should sit still, not supply people who wanted it, have a scarcity situation, shortage situation, with all the attendant results upon the people who buy the ultimate product, which these documents introduced yesterday show even have health and other public consequences, and affect all the little business men that stand between duPont and the ultimate consumer who make their livelihood upon some stage of the sale and distribution of cellophane? We took the course of promoting this invention. It was a way that made money for us, and that was an important

consideration. But I say also it was a way which was the proper way, the way that helped the consumer and helped the
4703 country, and to have a representative of this great Government of ours stand up and talk about never expanding, never conducting research because research will expand, not having new ideas, not finding new uses, not reducing cost, is to me a shocking exhibition, and the Sherman Act when it was passed in 1890 never had such an intent or purpose, and the thing that has made this country great has been what duPont has done as to cellophane.

Let us look at the documents. In the first place, they have not been presented in a chronological order again. For some reason which I cannot understand, the Government constantly likes to confuse us by putting its documents in out of order and unrelated one to the other. I would like to read into the record the proper chronology of this expansion. It starts with 417, then 415, then 418, then 419, then 420, then 421, then 422, then 455, then 456, then 424, 425, 125, 98, 132 and 114. They did not follow any such chronology, and they left out certain additions to plants that they have evidence about because it didn't help their case. We considered Clinton in 1937 and didn't put it in, your Honor, as one of these documents lets us see inadvertently, because there wasn't the market, there wasn't the need, there wasn't the business requirement, and then we revived it and put it in when is was needed. They don't tell you about that. They don't tell you about additions to machines at Yerkes and Buffalo No. 2.

I am not going to talk about each of these in detail,
4704 but I would like to talk about some. Will your Honor turn to the first one, 417. I am addressing myself to this question of intent, and the group is 417, 415 and 418. They all relate to a single addition of capacity. I want to see if any reasonable person can find in this some sort of evidence of an intention to exclude. This is in 1928. There was nobody else making cellophane in the United States. We were the pioneer—and, incidentally, it is very hard for me to see how someone can be first and not have all of it. Mr. Yerkes writes to the various officials and says, "Sales of cellophane for the past two or three months have exceeded our forecasts by such large amounts that it is obvious that immediate consideration should be given to constructing additional casting machines, and if the tariff is going to be put on we will have more to supply. So let's look into it."

Then in 415 we have a discussion of the various considerations, the fact that moistureproof is coming in and the sales are increasing at a very encouraging rate into fields where regular cellophane is not adaptable, that the tariff is shutting out some imports, that our forecasts are not working out, that our sales are

way ahead of our forecasts, and we talk about the need of getting the price down, conducting research.

Then we get the reasons summed up in 418, and there was
4705 one of the places where I interrupted, and I probably should not have, but the Government read paragraph 2 of the reasons. It was a good reason, it seemed to me. It was that, "The Du Pont Cellophane Company is the only manufacturer of cellophane in this country. In consequence we must be in position to supply any demand that develops." Well, who was going to do it if we didn't? Is that exclusionary or is that perhaps just a recognition of a certain amount of public responsibility?

But let us look at the other ones. He didn't read about future sales requirements. The rate of expansion of cellophane sales is 60 per cent ahead of 1927. Then he says that we have to put a sixth machine up just as soon as we can. Then he says, "The advent of moistureproof cellophane—" our own development, your Honor,—"has opened up new fields for sales that are not possible with normal cellophane." This is right at the beginning of the moistureproof. "Sales of moistureproof cellophane have been increased at the rate of 6,000 pounds per month since January this year." That is not exclusionary talk. That is business men saying in an appropriation request, which I can assure you gets very sharp scrutiny when it reaches the top committees of duPont, "We have got a lot of sales that we cannot meet."

Then look at the top of the next page, and these are important, your Honor, and they were also omitted, as much of the important data in these documents was: "An intensive campaign
4706 on quality of cellophane as manufactured has been started."

Was that wrong to decide that what we wanted to do was to improve this product, to put research money into it? And they say, "It is extremely desirable to have surplus capacity to further these results. Experiments to date to improve quality have been very slow for due to demand of production there have been no opportunities available to shut down machines for alterations and experiments." Is that surplus capacity to exclude competitors, or is that simply business men saying, "We want one machine here that we can have that is not busy all the time trying to catch up with these sales so we can find out ways and means of improving this business, improving the quality of our product."

Let me digress for a minute, your Honor, on that. I am going to come back to this. But we have in evidence an indication of what that kind of experimentation means. We have it in evidence that Sylvania machines operated at 55 meters in 1949. That is their top speed—55 meters. What were duPont machines operating at? 101 meters per minute, or twice as fast.

Mr. MINICUS. That is not in evidence, your Honor. That is under objection.

The COURT. What?

Mr. MINICUS. That is not in evidence. It was under objection by Mr. Gessell.

Mr. GESELL. You read it to the Court yesterday.

4707 The COURT. Well, now, it is in evidence. What exhibit is it?

Mr. MINICUS. It is Exhibit 410, which was read to the Court yesterday, and the various columns explained to the Court, at page 5586. These are the answers of the Sylvania Corporation to which Mr. Gesell objected so strenuously yesterday, your Honor, and they were not to go into evidence until we put a witness on the stand.

The COURT. They were not in evidence; simply marked for identification.

Mr. GESELL. I beg your pardon, your Honor. They were read to the Court yesterday in detail; this page was referred to, and they were left in subject to our checking the underlying data, and he spent several long minutes discussing this page and the other pages. Let us have the transcript. If he is going to discuss them, certainly I can. Page 1481 they appear, the Clerk tells me.

The CLERK. I was looking at the exhibits, 1481.

Mr. MINICUS. The plaintiff withdraws its objection, your Honor. Mr. Gesell can proceed and discuss them. They are going to be discussed in time by us anyway.

Mr. GESELL. They have already been discussed once. I am going to discuss them now with that permission.

duPont's machines today run twice as fast as Sylvania's. That means on the same machine we can make twice
4708 as much cellophane of a commercial productive kind. How did that happen? It happened from research and work to improve quality that you can see back here in 418 was starting as early as 1928.

4709. Now let us take a look at the fourth reason which was also admitted:

"Three of the machines are over four years old. As a consequence, the time required for proper maintenance is greater. If surplus capacity is available better maintenance will result than at present is possible. It is necessary to operate machines 24 hours a day, seven days a week, with only short intervals for repair."

Well, wasn't it all right to say, "Let us put some money in here and get just a little more flexibility so that we can get these machines in good shape"? Machines that were making this volume with the tolerances that were involved. None of this is exclusion-

ary. None of it talks of intent to exclude. All straight business facts.

I could go through these documents and point that out time and time again, and I think it would be an imposition on the Court.

Exhibit 418 is the final one in this group which summarizes the whole thing in a neat capsule form what I have been talking about.

Now, apparently in addition to this intent issue we are met with some kind of a charge that we were very good forecasters and that that showed our dominance or resulted from our dominance—

I was not clear which he said—but I would like to just take
4710 a run through this, Your Honor, and to do that, to show the situation I must refer to Exhibit 395 which is an answer we made to one of the Government's interrogatories, which is the second exhibit that Mr. Minicus will reach in the next section, and which is our own answer to an interrogatory.

Mr. MINICUS. Your Honor, I must insist upon the plaintiff's right to put in its evidence as it comes to it.

The COURT. What are you referring to, Mr. Gesell?

Mr. GESELL. Exhibit 395, your Honor, which is our answer to the interrogatory, which is the second exhibit we are yet to come to, and it shows per year the dollar unit of our sales.

The COURT. Well, have they been offered in evidence yet?

Mr. GESELL. No; he is coming to it in two documents.

The COURT. We will have to wait for it. I don't think you ought to start having comments on documents that are not in evidence. I think we have to be rigid about that in a fashion, because otherwise we will get far afield.

Mr. GESELL. I will comment on it this way, then, and I will come back to these documents, your Honor, when he gets through that. I will ask him to stop at the end of that second exhibit and return to my comments.

The COURT. Very well.

Mr. GESELL. Why he wants to keep it from us I don't know, but I will make this statement to you and I will prove it when he puts the exhibit in.

4711 The COURT. Don't be too harsh on Mr. Minicus. He takes pride in the way he wants to present his case and he has a right. That is his technique.

Mr. GESELL. Mine is to get the facts to your Honor.

The COURT. I understand.

Mr. GESELL. Here I ask your Honor to compare—and we will come back and compare for you what the forecasts were against the sales—and you will find—I can't talk about it. But how we can discuss whether we were a good forecaster and not look at what the sales were I don't know. We never caught up with the market.

The COURT. Let us take our mid-morning recess.

(At this point a brief recess was taken.)

Mr. GESELL. Your Honor, I have covered my discussion of the law and our general position on this group of documents, and I would now like to turn and point up the few business facts that are lurking here but have not been called to the Court's attention. May I ask you to turn to Exhibit 394 at page 5481?

There you have a reflection of the best guess the company was able to give on its potential capacity, and if you relate that to other exhibits which are in evidence and see when the plants came in, a very interesting situation develops. Between 1932 and
4712 1933 under the Yerkes Buffalo plant we have written evidence that Yerkes No. 2 came into production. Now from that date until 1949 without the installation of anymore machines look at the growth that took place in the capacity: from 17,000,000 pounds to 20½.

Take Old Hickory. Both plants were in operation at the beginning of 1931. The capacity was 16 million. 1949, today, without anymore machines going in, the capacity is 47 million.

Take the Spruance plants, both No. 1 and No. 2 were completed by 1938. And look at the jump: from 29 million, 600 thousand in 1938 to 54 million in 1949.

Now, there is some capacity that came into production here that we did not hear anything about from the Government. That was the result of constant research, constant improvement in methods and processes. It must have been. We are going to hear a lot more about that as the case comes along, but here you get a reflection of what the industrial genius of this company brought about working with existing tools and perfecting them to make more goods.

I assume that these expansions must be equally attacked under the Government's theory, because we did not put them in unless they would pay. We did not put them in unless the business situation justified, and certainly any business man expanding his capacity always recognizes the fact that that has some re-
4713 lation to others in the market. So here we have a great, broad development or production through research which, under the Government's theory, is equally indicted.

I would like to say a word now about the west coast plant on which this last group of documents is concerned. There was great discussion in the company as these documents show for a period of time after the war as to whether duPont should build on the west coast or whether it should build at Clinton. Business considerations of all kinds were discussed back and forth, including the very obvious fact that if duPont did not put up a plant on the west coast and if the market justified a plant, then duPont's

competitor would put up a plant; and that view was pressed and there were some documents suggesting that that was a consideration for Mr. Carpenter; but I ask your Honor to consider what happened. That consideration did not control. Had that been the basic intent of Mr. Carpenter or anybody else it would have controlled. The plant was built at Clinton, not on the west coast, as the Government's own complaint shows, and why was it built at Clinton? Not for reasons of exclusion of competitors, but because there the return on investment was best; there the greatest market was; there you had existing facilities you could join the plant to; there was the logical business place for the company to manufacture.

4714 So again in the conduct, viewing it as a whole, you have a negativing of the intent which the Anti-Trust Division is trying to infer from these documents.

There is one other document, your Honor, and then I have finished, and this one I would like your Honor to take up. It relates to the Clinton project. It is Government's Exhibit 425, appearing at page 5648. Mr. Minicus read the first page and then skipped to the sixth page, which says, "The competitive situation." It is a document of Mr. Hatt discussing reinstating the Clinton project, which had been abandoned earlier. Now, that reading of the document distorts what is in it. Competitive considerations were considered by Mr. Hatt including, incidentally, your Honor, competition not alone from Sylvania but competition from other competing materials in the packaging market. And I know your Honor has that point of ours well in mind.

Let us see what else he talked about. And I hope, your Honor, without my going to the laborious job of reading this into the record, your Honor will mark this as one for special study.

The COURT. Special?

Mr. GESELL. Special: because you will see in this document common sense business considerations of every possible aspect of this new construction.

We have seen it costs a lot of money to put up one
4715 of these plants, running into the millions from these documents, and that isn't spent lightly or foolhardily by this defendant.

So you have a detailed review in this document of all the considerations which underlie this last big installation, this Clinton project. And he talks about the forecasts, and he talks about the need of equipment for maintenance. He talks about a very interesting fact here, your Honor, which is overlooked in the Anti-Trust Division's presentation, that if you want to have a plant in production eighteen months from now, you have to plan now.

That is why you forecast. Mr. Hatt says it takes eighteen months. You have got to get the land, you have got to make the surveys, you have got to put up the building. And that is why we were forecasting, because when the plant came in eighteen months from now we wanted to know what is the situation going to be. And you will see that he discusses improvements of speeds, and a whole host of practical business considerations for the construction of the plant, for the location of the plant.

Over on page 5652 he is talking about the great opportunities in the bread wrapper business, which we know is in large part supplied by other materials, and his desire to get into that field more broadly; that this is but one industry and there are others in which we have substantial prospects as well, and because of this prospect we require more than we now have at an early
4716 date. He says that our competitors in the bakery business, which include these other materials, do a very necessary and satisfactory job of presenting their material to the public in an acceptable way, and so forth.

Until Mr. Minicus gets to 395, I would then like to again discuss these documents.

Mr. MINICUS. I submit to your Honor that it is rather difficult for the plaintiff to present its case in a matter in which Mr. Gesell approves. If we read the entirety of a document, we are impinging on the Court's time. If we attempt to be selective and read the portions of the document that we think pertinent to the point we are making, we are distorting the document. So we have had to come to the conclusion that the best thing to do is to read the documents as we see them. I might also submit to the Court that when we read a document, unless we expressly say so, we are putting that entire document in evidence and it is before the Court.

Now, Mr. Gesell made a concession in the course of his comments that for our purposes we deem extraordinarily and extremely important. Mr. Gesell has said that this position that duPont enjoys in this industry, this 76 per cent of the total, was achieved deliberately and through the efforts of the duPont Company. We say that any such dominance as that must have attendant upon it certain monopoly powers that we say bring it within the scope of the Sherman Act. Judge Learned Hand has said that when that kind of dominance is achieved,
4717 providing it was not thrust upon the party, it is within the scope of the Sherman Act. We are very well satisfied with that concession, your Honor, and that is the only point that we have gone into this expansion matter to prove.

As to Mr. Gesell's discussion time and time again on the product

patent, we refuse to answer that. We have a great deal to say about that product patent, and we will say it at the proper time.

I would just like to pause a moment on Mr. Gesell's comments on the Alcoa case. In the first place, counsel for the defense said finally that this whole business of expansion was a theory that we had dreamed up. I think he said it was the theory of the Anti-Trust Division. Let me point out to your Honor that the Anti-Trust Division would never have presented this subject matter without the precedent authority of the Circuit Court of the Second Circuit, which I might say was approved, the entire economic theory of that case was approved and expressly approved by the Supreme Court in the American Tobacco case. So it is not a theory of our own invention at all. I consider it to be a well recognized doctrine of law.

As to the factual comparison between this case and the Alcoa case, Mr. Gesell has pointed out, and rightly so, the distinction between 90 per cent of the total supply enjoyed by the Aluminum Corporation and the somewhat in excess of 75 or 76 per cent present here. That, of course, is one of the issues
4718 this Court will have to decide. We submit to the Court, and for its decision, that in a duopoly situation in a market, that the same powers—and it is the powers that govern, not an arbitrary percentage—that the same powers will flow from 76 per cent as flow from 90 per cent.

Mr. Gesell also said that the percentage of control, that is, the relative percentage of output duPont vis a vis Sylvania has been constantly declining. I am not going to say any more on that point, your Honor, except to say there are some charts forthcoming that will positively refute that statement.

One other point, Mr. Gesell attempted to distinguish the factual situation before us now from that existing in the Alcoa case on the basis of the fact that Alcoa had no competitors. Alcoa, as a matter of fact, your Honor, had a mighty impotent competitor that this defendant doesn't have. The record is replete with the facts, the opinion recognizes it, that there were a great many exports coming into the United States of virgin aluminum, and there are substantially no exports of cellophane into the United States. That was Alcoa's competitor. That is where we get the 90 per cent from. The other 10 per cent were imports.

I would like to end on that point because my next subject concerns the imports which have been discussed heretofore. So
4719 I will just briefly cover them at this time, with reference again to the exhibits on which our position is based.

The defendant's answer in paragraph 11 admits that their imports are small. It is only our purpose at this moment to show

how small they were. We will put in the basic material now and have recourse to demonstration at a subsequent time.

Government's Exhibits 182-A and 182 have previously been admitted into evidence. At the time of their initial offer they were put in primarily for the purpose of showing what were the countries of origin of these imports and to show that except in very exceptional cases, these imports did not come from countries outside of the territorial allocation that duPont had according to the agreements.

At this time attention is called to these exhibits only for the totals as appear in the first column following the column setting forth the years.

The Government has a document here entitled "Table 12, Annual Production and Imports of Cellophane in Pounds." The Government requests that this document be marked Exhibit No. 539 for Identification.

(The document referred to was marked "Government's Exhibit No. 539 for Identification.")

Mr. MINICUS. As to the index preceding the Government's volumes of evidence, we remain at approximately the same point, but we turn now leaving the basic material on dominance in
4720 production and dominance in supply available to buyers in domestic markets to certain monopoly powers that we claim flow from and were attendant upon this dominant position.

The first of these powers to which the Government invites the Court's attention is that of market control—control of the markets for cellophane and caps and bands. A basic premise in this regard is that this dominance of position plus the industrial structure of this industry, this duopoly situation that we have spoken about, two sellers and many buyers, has resulted in virtually absolute control of the markets in the United States for cellophane and caps and bands.

4721 Now, market control from the plaintiff's point of view will be considered under three sub-headings. There are three sub-categories to this consideration of market control.

First, we will make our presentation designed to establish and formulate the predominance in the sales made in this industry by the defendant corporation. We will consider the quantity of these sales in the market place, we will consider the dollar value of those sales and relate the dollar value of those sales to the only other seller in that market. After we have considered that matter we will turn then to the second contention of the Government that the defendant has brought within itself almost absolute control of the marketing outlets in this industry: that is, that the buyers existing in this market place very largely have been brought under the control of this defendant corporation.

Finally, we will show in what manner and means it has been enabled to affect the supply available in this market place. In other words, we have under this concept of market control as a monopoly power a component power, the power to control and affect supplies.

I would like to point out to the Court before proceeding, so that my position will not be misinterpreted, that what we are dwelling on here momentarily are manifestations of this thing we call "market control," not the means by which it was
4722 achieved. That will come later. The genesis, the maintenance and the effects of this thing called "control" will be found in the whole record as finally established. We never get away from it. In that respect courts do make determinations of market control as affected through size alone, as we say is the case here, or as affected through possession of strategic factors in an industry; for example, mass patents, as one of the instances here, or again the strategy of the defendant with respect to those within and without the industry; and that will also be dwelt on at length in our presentation at a later point. But the concern here is primarily, in fact, contained within indicia of this market control. It is a study in status and not in movement. The rest will come later.

Following our discussion of market control, because it is an integral part of the concept, we will turn to a consideration of the power to fix arbitrary and non-competitive prices.

I should like to turn first to the point stated in paragraph 54 of the trial brief. It there states that sales of these products to purchasers in the United States by the two domestic manufacturers on a comparative basis consistently reflect the defendant's predominant control of supplies available to the market. In support of that division we will proceed to the documentary proof.

The Government offers in evidence Government Exhibit No
88, appearing at page 339. This is a report by the Rayon
4723 Department to the Executive Committee, dated March 10, 1947. The Government desires to make a limited offer of this exhibit and states to the Court that it relies only upon page 1 and the first paragraph of page 2.

Mr. GESELL. May I interject to be sure I understand that phrase, your Honor? "Limited offer" means the whole exhibit is in?

The COURT. I don't know.

Mr. GESELL. I don't know either.

Mr. MINICUS. We are not offering the remainder of the exhibit, your Honor.

Mr. GESELL. I object on the ground that the introduction of a partial section of this report makes the document misleading and misrepresents its contents.

Mr. MINICUS. We submit the part we are offering, your Honor, is not misleading as to the document as a whole, because the part we offer is a self-contained unit and has no reference to the part we omitted.

The COURT. Can you show me wherein that is not precisely the fact?

Mr. GESELL. Well, your Honor, this is one of I suppose 20 or 30 of these competitive reports that were regularly submitted in the operations of the company that I understand are in Mr. Minicus' case. He proposes to offer, as I understand it, the first page.

4724 Is that right?

Mr. MINICUS. That is correct.

Mr. GESELL. There is no break between the first and second pages, and you see the second discusses competitive materials which he does not like to have come into the case, and discusses aluminum foil being used on butter, discusses the packaging field, and here is a report entitled "Competitive Report", and isn't it pertinent to a discussion of the market position that he wants on the first page, his notion of the market, to show what we thought was the competition on the second page where there is no break between the two? I object to the introduction of this document except in its entirety.

The COURT. Objection sustained.

Mr. MINICUS. In that event I think it wise to read the entire report. I want it understood, your Honor, that the Government is putting this report into evidence feeling by virtue of the sustaining of the defendant's objection matter is being put into the record which is not material to the issues in the case.

With that reservation we will proceed to a reading of the entire report.

The COURT. I don't know what you mean by "reservation". You either offer the document or you don't offer it.

Mr. MINICUS. We are offering the document.

4725 The COURT. If you want to rely on any particular material contained in the writing, I think you have a perfect right to do so. That is your case. Don't go beyond your case.

Mr. MINICUS. But, your Honor, you see, unfortunately we are not able to control the subject matter that we are going to put into our case. These are not our documents. These are documents that were turned over to us by the defendant corporation and they are full of self-serving declarations which could not otherwise be put into the record.

The COURT. I thought I had resolved this question on a memorandum I had filed the day before yesterday. I tried to as clearly as I could. Therefore, I have nothing further to say about the matter. Either the whole document goes in or it goes out. If it goes in, you can rely on all or any part or parts as you see fit. From those parts then argument commences on what worth I should give to the part you rely on, and if I later arrive at the conclusion that the issue should either be A or the issue should be B—I am now talking about markets—no harm has been done by having the whole document in.

Mr. MINICUS. Very true, your Honor.

The COURT. You see, I have this view on evidence: It may be subject to some criticism, but I want to see all in a document. It is not that the Court is going to be persuaded or can utilize all in the document. When I come to decide the case I am going to be bound by legal standards and I can only marshal facts
4726 either one way or the other in support of my position.

So unless you want to re-argue the question—I was going to make you a promise that I will always allow you to re-argue but I better not be so liberal. If you want to re-argue this question as to the totality of any particular writing, I will hear you.

Mr. MINICUS. I don't think the question needs reargument, your Honor. We are well satisfied with your decision in that case. We don't think it went to the extreme of including material that is irrelevant to the issues; and that point, we admit, is not decided. I think the subject matter in this document that Mr. Gesell is addressing himself to now——

The COURT. He has not addressed himself to anything yet.

Mr. MINICUS. I said I think the subject matter that he is addressing himself to that is in this document concerns the decision pending before your Honor at the present time. There is a possibility that that may be determined to be irrelevant to the issues in this case. I haven't read your Honor's previous decision to the effect yet that you feel that irrelevant material, material completely irrelevant to the issues in the case, simply because it is in the documents, should be included in our trial in evidence or even open for discussion.

The COURT. Are you putting the question to me?

4727 Mr. MINICUS. No, I simply stated that that was my understanding of your opinion. I hope I am not in error, your Honor.

The COURT. Well, I am not going to indulge in the practice of explaining my own opinions. Counsel can interpret them as they see fit.

What about this document?

Mr. MINICUS. This is an annual competitive report from the Rayon Department to the Executive Committee of the duPont Company, an annual report for the year 1946, and it is dated March 10, 1947.

(The annual competitive report for 1946 to Executive Committee from Rayon Department, dated March 10, 1947, was received in evidence and marked "Government Exhibit No. 88.")

Mr. MINICUS. I commence reading:

"II. Cellophane.

"Viscose Film.

"Shipments and Share of Business in millions of pounds."

Then follows a table for the years 1941, 1945, and 1946, with percentages for those years, and in the final line a column showing the percent of increase.

The table shows that in 1941 duPont sold 101,000,000 pounds in round numbers; Sylvania sold 27,000,000 pounds; the industry sold 128,000,000 pounds; and that for 1941, duPont's share was 79%, Sylvania 21%.

4728 In 1945 duPont sold 96,000,000, 77%; Sylvania 29,000,000 pounds, 23%; the industry 125,000,000 pounds.

For 1946 duPont, 106,000,000 pounds, 75% Sylvania 35,000,000 pounds, 25%; the industry 141,000,000 pounds.

"1946 as a percent of 1945; duPont 110, Sylvania 121."

I might point out to your Honor that in case this be misconstrued, these are selected years, and although it shows a declination of duPont's participation, I think the full chart will correct any misunderstanding there might be from the three figures here.

I continue reading:

"Cellophane production was curtailed during the war as the result of Government action to preserve manpower and raw materials. In 1942 the industry reached a low of 111,000,000 pounds with duPont participating to the extent of 83,000,000 pounds or 74%. In subsequent years the industry regained much of what it lost as the result of vigorous demonstration of the war utility of cellophane. During the war our cellophane capacity was reduced by the eight machine unit at Yerkes which was converted to tire yarn and is likely to continue on that product. Subsequent increases were the result of augmented productivity of the remaining facilities. Not until 1946 was the pre-war record of 1941 exceeded.

4729 "The demand for cellophane is substantially in excess of capacity and we expect this to continue despite our forecasts to produce 138,000,000 pounds during 1947 and despite indicated plans of expansion by the Sylvania Division of the American Viscose Corporation."

I should like to point out that at the conclusion of that paragraph when the plaintiff was demonstrating in these previous documents that the expansion was accompanied by an anti-competitive intent we never indicated and we have not maintained that the expansion was able to keep up with increase in demand. Quite the contrary is the case, as we shall show at some length later on. In fact, they created a Frankenstein here. They created something they could not keep up with.

4730 I continue reading:

"Currently Sylvania is the only other domestic producer of viscose film. They were able to improve their relative position in the trade during 1946 due to more rapid increase of production."

Now, that statement does not jibe with some of the statements we heard about the great efficiency of the duPont Company just a few moments ago.

It was at this point, your Honor, that I had intended to discontinue my reading; I think I would like to continue with the remainder of the document——

The COURT. You are not doing that under compulsion from me?

Mr. MINICUS. I understand that perfectly.

Mr. GESELL. Or me.

Mr. MINICUS. Well now, I am a little confused.

The COURT. Go on, Mr. Minicus.

Mr. MINICUS (reading). "Non-cellulosic films partly stimulated by special war applications and now greatly encouraged by the severe undersupply of cellophane have recently shown an increased rate of activity. They include Goodyear's Pliofilm, a pre-war product temporarily delayed by the lack of natural rubber, Goodyear's Vitafilm (vinyl), polythene film by Visking and several other producers, Firestone's Velofilm (vinyl) and Reynolds Metals aluminum foil and others.

4731 "Generally speaking, the price of these new films limits them to special uses including fabric replacement in shower curtains, tablecloths and other non-packaging utilization. Pliofilm selling for around 85 to 95 cents per pound, about double the price of cellophane, is making some headway in produce, meat and poultry packaging largely due to the lack of cellophane. We estimate current Pliofilm production at about 150,000 pounds per month.

"Polythene film is used in frozen food locker bags, household utility bags, etc. The Plastics Department estimates total polythene film production by all producers at 5,000,000 pounds for 1946.

"Aluminum foil containers are being used in the frozen food field, the wrapping of butter, etc. Reynolds is very actively pro-

moting a laminate of aluminum foil and glassine for cigarette packages."

The COURT. Just for my own information, will this recent restriction cover Reynolds' products?

Mr. MINICUS. I understand so, your Honor.

[Reading:] "The packaging field is still broadly a domain of cellophane to the extent that the industry is capable of supplying the demand. The war-time shortage of cellophane has amply demonstrated the utility of the product beyond mere sales appeal.

Substantial new uses, including the packaging of fresh vege-
4732 tables, fresh meats, and bread, are awaiting the availability of additional cellophane.

"The development of waste-free unit packages of vegetables, meats and other commodities for self-service has stimulated the demand for engineered transparent packaging materials beyond any even recent expectations. The largest potential for cellophane now appears to lie in the food industry which requires very large quantities of film at much lower costs than any of the non-cellulosic films are likely to achieve, in the foreseeable future anyway."

The COURT. You know, I think you wanted to read that whole document anyhow.

Mr. MINICUS. I assure your Honor I did not. We still maintain that the subject matter is irrelevant.

Now, I don't consider that the remainder of this document is relevant, and I will not read any further, your Honor.

The COURT. I did not stop you, did I?

Mr. MINICUS. No, sir.

The Government offers in evidence Exhibit No. 395 appearing at page 5488. This is Interrogatory No. 3 answered by the duPont Company and shows duPont's annual sales of cellophane, including transfers, for the years 1924 through 1949. The years 1948 and '49 are not offered by the Government at this time.

Mr. GESELL. Well now, they are offered subject to the same limitation, I take it.

4733 The COURT. We had that out yesterday. We reserved all questions for the years '48 and '49——

Mr. MINICUS. I am sorry I mentioned it.

The COURT. Well, Mr. Gesell was the one who made the suggestion, in fact, that we make no further point of the matter.

Mr. MINICUS. I should have omitted my statement.

The COURT. All right. Proceed.

(Interrogatory No. 3, "duPont's Annual Sales of Cellophane (Including Transfers)," was received in evidence and marked "Government's Exhibit No. 395.")

Mr. MINICUS. You will note that this is a table set out in double columns. In the first double column under (a) we have "Total Cellophane," then listed thereunder for the appropriate years by pounds and then next to it by dollar value. The next column under (b) is "Plain Cellophane," by pounds and by dollar value. The third column, "Moistureproof Cellophane," by pounds and dollar value.

The COURT. What is the definition of "dollar value"?

Mr. MINICUS. That is the dollar receipts for the cellophane sold for that year.

The second page of this answer to our interrogatory, to wit, page 5489, is duPont's annual sales of cellulosic caps and bands. You have the same situation with regard to the years. Under column (d) we have caps according to units and also according to
4734 dollar value. Under (e) we have bands in thousands of units and also for dollar value.

The Government offers in evidence Exhibit 411——

Mr. GESELL. Your Honor, would it be appropriate now that 395 is in to return to those earlier documents and discuss the point I was desirous of making?

The COURT. I have lost the thread there. You say it is appropriate to your case?

Mr. GESELL. I don't know whether it is appropriate or not. I can defer it just as well.

The COURT. It does not matter. We will resume after lunch and then decide whether Mr. Minicus stops now and you go forward. See if you can agree.

Mr. MINICUS. I have no objection.

The COURT. All right. Recess until 2:15.

(At this point a recess was taken until 2:15 o'clock p. m. of this same day.)

4735 2:15 O'CLOCK P. M., THE SAME DAY.

Present: As before noted.

Mr. GESELL. Your Honor, Mr. Minicus wishes to put on a witness at this time, and I told him that is quite all right with me. We can get to those comments a little later.

I should like to reserve about ten minutes at the end of the day, if we could, to take up some details with respect to the adjournment, sort of housekeeping matters which I should like to discuss with the Court and Mr. Minicus at the end of the day if we have the time.

Mr. RENNINGER. If your Honor please, we expected to be a little farther along in this case at this time, so we called a witness from the Sylvania Industrial Corporation, or rather from the Sylvania

Division of American Viscose Company for the limited purpose of identifying the Sylvania price lists.

At this time I should like to call Mr. Hamburg.

HERBERT H. HAMBURG, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. RENNINGER:

4736 Q. Please state your name and address.

A. Herbert H. Hamburg, Hotel Sylvania, Philadelphia.

Q. Where are you employed, Mr. Hamburg?

A. By American Viscose Corporation, Sylvania Division, at Philadelphia.

Q. How long have you been employed by the American Viscose Company?

A. By the American Viscose Company or by Sylvania?

Q. By American Viscose.

A. Since 1946.

Q. Prior to that time by whom were you employed?

A. Sylvania Industrial Corporation since their inception in 1929.

Q. What is your present position with Sylvania?

A. Office manager and assistant to Mr. Little, General Sales Manager.

Q. What other positions, if any, have you held with the Sylvania Industrial Corporation or the Sylvania Division of American Viscose Company?

A. Well, I have been assistant to Mr. Replogle who had been Sales Manager before, and subsequent to that to Mr. Little.

Q. Your present position is again what?

A. Assistant to Mr. Little and Office Manager.

Q. Mr. Hamburg, I show you Government's Exhibit or part of Government's Exhibit 529, page 7042. Can you identify

4737 this exhibit?

A. Yes.

Q. Will you state what that is?

A. Well, it represents a bulletin outlining our prices as of January 11, 1930, on moistureproof sheets, stock size and cut-to-size sheets.

Q. I hand you part of Government's Exhibit 529, consisting of page 7043. Will you state what that is?

A. This represents a bulletin dated January 11, 1930, outlining the prices on both moistureproof and non-moistureproof rolls.

Q. Can you identify that, Mr. Hamburg?

A. That was the first one.

Q. I hand you part of Government Exhibit 529, consisting of pages 7044 and 7045. Can you identify it?

A. Yes. This likewise is a bulletin outlining prices as of January 23, 1930, of rolls, stock size sheets, and cut-to-size sheets of both moistureproof and non-moistureproof Sylvania cellophane.

Q. I show you Government Exhibit No. 194, page 539. Can you identify it?

A. Yes. This represents a photostatic copy of our price list effective February 1, 1930, under the trade name of Fenestra, outlining cut-to-size sheets and stock size sheets of non-moisture-
4738 tureproof and embossed cellophane of Fenestra at the time.

Q. I hand you Government Exhibit 196, page 541. Can you identify it?

A. It represents a photostatic copy of our price list 3A, effective May 26, 1930 on cut to size and stock size sheets.

Q. I show you Government Exhibit 197, page 542 and 543. Can you identify it?

A. This represents a photostatic copy of our price list 4A, effective August 1, 1930.

Do you want me to elaborate as to what it calls for as I have done in the previous ones?

Q. I don't think it is necessary.

Mr. RENNINGER. Do you insist on it, Mr. Gessell?

Mr. GESELL. No.

4739 By Mr. RENNINGER:

Q. I hand you Government's Exhibit 199, pages 544 and 545. Can you identify it?

A. This represents a copy of our price list 5–A effective October 1, 1930.

Q. You are checking with your price lists?

A. That is right.

Q. I hand you Government's Exhibit 201, page 547. Can you identify it?

A. Photostatic copy of our price list 5–N, effective November 1, 1930.

Q. I hand you Government's Exhibit 202, pages 548 and 549. Can you identify it?

A. This represents a copy of our price list 6–A effective March 2, 1931.

Q. I hand you Government's Exhibit 204, page 551. Can you identify that?

A. Yes. This represents a copy of our price list 6–N effective March 2, 1931.

Q. I hand you Government's Exhibit 205, consisting of pages 552 and 553. Can you identify it?

A. Yes, a copy of 7–A, price list 7–A, effective August 1, 1931.

Q. I hand you Government's Exhibit 206, page 554. Can you identify it?

4740 A. Yes, a copy of our price list 7–N, effective August 1, 1931.

Q. I hand you Government's Exhibit 207, pages 555 and 556. Can you identify it?

A. Yes, a copy of our price list 8–A effective May 2, 1932.

Q. I hand you a copy of Government's Exhibit 529, pages 7046 and 7047. Can you identify it?

A. A copy of our price list 9–A effective January 11, 1933.

Q. I hand you Government's Exhibit 210, pages 559 and 560. Can you identify it?

A. A copy of our price list 10–A effective May 14, 1934.

Q. I hand you a copy of Government's Exhibit 211, pages 561 and 562. Can you identify it?

A. A copy of our price list 11–A effective January 7, 1935.

Q. I hand you Government's Exhibit No. 214, pages 564 and 565. Can you identify it?

A. A copy of our price list 12–A effective April 15, 1935.

Q. I hand you copy of Government's Exhibit 217, pages 568 and 569. Can you identify it?

A. Copy of our price list 13–A effective December 16, 1935.

Q. I hand you a copy of Government's Exhibit 219,

4741 pages 571 and 572. Can you identify it?

A. Copy of our price list No. 14 effective May 1, 1937.

Q. I hand you a copy of Government's Exhibit 221, pages 574 and 575. Can you identify it?

A. Copy of our price list No. 14, effective December 5, 1938. I might qualify by saying that the previous list was also No. 14 but it applies to colors only.

Q. That is, Government's Exhibit 219?

A. That is the previous exhibit.

Q. That is the previous exhibit?

A. That is right.

Q. I hand you a copy of Government's Exhibit No. 223. Will you identify it?

A. Copy of our price list No. 15, effective October 30, 1939.

Q. I hand you a copy of Government's Exhibit No. 224, pages 579 and 580.

A. This is also a copy of our price list No. 15, October 30, 1939, in the revised form.

4742 Q. I hand you a copy of Government Exhibit No. 226, page 582 and 583. Can you identify it?

A. This represents a copy of our price list No. 16L, effective November 1, 1941.

Q. I hand you a copy of Government Exhibit No. 227, page 584 and 585. Can you identify it?

A. This represents a copy of our price list No. 17, effective January 22, 1947.

Q. I hand you a copy of Government Exhibit No. 228, page 586 and 587. Can you identify it?

A. This represents a copy of price list No. 18, effective June 1, 1947.

Q. I hand you a copy of Government Exhibit No. 229, page 588 and 589. Can you identify it?

A. This represents a copy of our price list No. 19, effective November 1, 1947.

Q. I hand you a copy of Government Exhibit 253, pages 653 and 654. Can you identify it?

A. It appears to be a copy of a sales bulletin, No. 174, dated November 18, 1933, on caps and bands.

Mr. GESELL. Is it or isn't it?

The WITNESS. As far as I can identify it, it is.

Mr. GESELL. I was talking to Mr. Renninger.

By Mr. RENNINGER:

Q. Is that right?

4743 Q. I hand you Government's Exhibit 261, pages 682 to 689, inclusive. Can you identify that?

A. That is a copy of our Bulletin No. 344, dated December 5, 1938, on bands.

Q. I hand you Government's Exhibit 262, pages 690 to 696, inclusive. Can you identify it?

A. A copy of our Bulletin No. 372, dated July 31, 1939, on Sylvania bands.

Q. I hand you Government's Exhibit 263, pages 697 to 704, inclusive. Can you identify it?

A. It represents a copy of our Bulletin No. 372, dated July 31, 1939 on bands.

Q. I hand you Government's Exhibit 264, pages 705 and 706. Can you identify it?

A. Photostatic copy of our printed Price List No. 4 effective July 31, 1947, on cellulose bands.

Q. All these exhibits that I have handed to you, Mr. Hamburg, are they true copies of published price lists issued by the Sylvania Industrial Corporation or the Sylvania Division of the American Viscose Company as to what they purport to be?

A. Yes, they are.

Mr. RENNINGER. I offer into evidence parts of Government's Exhibit 529, consisting of pages 7042 to 7046 inclusive; Government's Exhibits 194, 196, 197, 199, 201, 202, 204, 205, 206, 207,

4744 210, 211, 214, 217, 219, 221, 223, 224, 226, 227, 228, 229, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, and 264.

Mr. GESELL. If your Honor please, I have no objection to Mr. Renninger going and examining further about these documents, but I would like them to come in subject to my motion to strike, that I may have following the testimony of the witness.

The COURT. Well, do you want to examine the witness on voir dire as to these documents?

Mr. GESELL. I want to examine him as to some aspects of them, yes, your Honor, but I would prefer to do that at the conclusion of the complete direct.

The COURT. All right.

Mr. GESELL. I don't want to impede Mr. Renninger with any questions he has and he can treat them as in if it is subject to my motion to strike.

The COURT. The reservation will be made.

Mr. RENNINGER. If your Honor please, as I stated in the beginning, I brought Mr. Hamburg here for the limited purpose of identifying these price lists. We feel that they have been properly identified and should be admitted into evidence as such.

The COURT. Well, whenever a document is handed to a witness, Mr. Renninger, he can always be examined on voir dire as to that document and its contents before it is actually put into evi-

4745 dence. That is orthodox. So that if Mr. Gesell wants to question him concerning these documents, there is not only no rule that stops him, but there are hundreds that say he can.

Proceed, Mr. Gesell, if you have anything to ask the witness.

Mr. GESELL. I have.

Cross-examination by Mr. GESELL:

Q. Mr. Hamburg, are these all of Sylvania's price lists that the company has published at the time you worked for Sylvania and American Viscose?

A. To my knowledge they are, with the exception where we have issued small quantity price lists, for quantities less than those prescribed on the lists which we have in evidence—which you have in evidence.

Q. Which of the exhibits was the 1950 price list that you identified?

A. I don't recall identifying any for 1950.

Q. Don't you have a 1950 price list?

A. Surely.

4746 Q. Then do you want to change your answer to my question? These are not all of the price lists that Sylvania has issued?

A. No, up to the date questioned. There have been subsequent price lists.

Q. What date was that, Mr. Hamburg?

A. Price List 21 to Price List 24, inclusive. That goes back from February 1, 1948 to December 15, 1950.

Q. That would be how many price lists in that period since the last one you identified?

A. Well, five.

Q. Now, do these price lists show your export prices?

A. They do not.

Q. Did you have price lists for export prices?

A. Yes.

Q. Then do you want to change your answer about that? They don't show your export prices either, do they?

A. No, they do not. My answers applied to the documents shown me in evidence. I wasn't questioned whether there would be any additional ones. I authenticated those given to me.

Q. All I am trying to bring out is, you were not shown all the price lists, is that the fact?

A. That is right.

Mr. RENNINGER. If your Honor please, I object. We consider any price lists after 1947 as immaterial at this time.

4747 Mr. GESELL. He is talking about some before now.

By Mr. GESELL:

Q. You don't have your export price lists. You don't have your price lists after 1947 in the group that you identified?

A. That is right.

Q. Now, do you have jobber price lists?

A. No, we have not issued any jobber price lists.

Q. You have special jobber prices?

A. We have agents' prices, yes.

Q. Do you have an agents' price list?

A. No, we have not established one.

4748 Q. But you have agents' prices that don't appear in this group of schedules you identified?

A. That is correct.

Q. What are your agents' prices as of today?

A. It is list price less a discount.

Q. What is the discount?

Mr. MINICUS. I object to this question, your Honor.

The COURT. Give me the reason.

Mr. MINICUS. Our most basic reason is that we have not offered any price list subsequent to the filing of the complaint in this action. We did not consider any price list subsequent to the complaint, so it is not material to any issues in the case. The second

objection is based on the ground that it is far beyond the scope of the direct examination. I don't see any point at the moment in examining the witness about the 1948–1949 and 1950 price lists, because the Government is not relying on those. I don't see——

Mr. GESELL. I am simply establishing the foundation for an objection that the complete lists are not being presented. Since they are going to be compared with the duPont lists for the purpose of showing price similarity, it is important to determine whether we have all the price lists or some of them.

The COURT. I don't think that objection would be sufficient to condemn the whole offer of the Government. If the Gov-
4749 ernment's proof contains gaps, then it seems to me you point out the lack of weight I should give that testimony.

Mr. GESELL. Your Honor, don't I have to show what the gaps are by asking him?

The COURT. Yes, but I will let you start with 1947 and go backward. I don't think I will let you go into 1948 and 1949 when the Governments says they are not relying on them. You can't make the Government rely on something that it says it is not going to rely on.

Mr. GESELL. Well, I am going to take the ruling and we will argue it out when the time comes.

The COURT. All right. Let the ruling be noted.

By Mr. GESELL:

Q. Did you have agents' prices prior to 1947?

A. Yes.

Q. For what period of time prior to 1947?

A. To my recollection, since we are established in 1929.

Q. Have they always been the same or have they differed in that period?

A. They have differed.

Q. Can you tell us what they have been over the period?

A. I can't recall.

Q. What were they in 1947?

A. I don't know offhand.

Q. And I can't find that out from these schedules, can I?

A. No, they are not on these schedules.

4750 Q. Do these schedules show—you understand under the Court's ruling all of my questions relate to prior to 1947?

A. Yes.

Q. I am not mentioning the date, 1947 and prior. Do these schedules show the prices on all your different types of cellophane that you sold?

A. No, they do not.

Q. What types do they show prices for?
A. Those we consider specials or non-standard items.
Q. What are they?
A. For example, it might be No. 600 red or it might be No. 450 black, types which are not commonly sold.
Q. Do you have a considerable number of those types?
A. We have a number of types. The orders are not too plentiful.
Q. And they do not appear in that list?
A. No.
Q. Did you have a converter's discount?
A. Yes.
Q. Do these price lists show us what the converter's discount was?
A. They do not.
Q. Can you tell us what it was between 1929 and 1947?
A. Offhand, no.
Q. Can you tell us what it was in 1947?
4751 A. No, I cannot without referring to my records.
Q. Have you got them here?
A. No, I haven't.
Q. Do these schedules show your cash discount policy?
A. These price lists do, yes.
Q. Do they show your freight equalization policy?
A. They do not.
Q. Did you have such a policy?
A. We did.
Q. Was it the same in the period we have been talking about, 1929 to 1947?
A. I believe so. They were equalizing at competitive shipping points.
Q. You equalized to duPont's plants; isn't that right?
A. That is right.
Q. To absorb freight in some cases?
A. That is right.
Q. What about Fenestra, the name that appears on the first two of these schedules? Was that a Sylvania product?
A. That was the registered tradename of Birn & Wachenheim.
Q. That was not cellophane manufactured by Sylvania?
A. Just one second. No, it is applicable to price list dated February 1, 1930, which is prior to the time we manufactured cellophane.
Q. So those were price lists for Birn & Wachenheim?
4752 A. Or Sylvania Industrial Corporation.

Q. As re-seller for Birn & Wachenheim?

A. No. If I remember correctly, Sylvania Industrial Corporation absorbed Birn & Wachenheim sometime in 1929, and the name Fenestra went along with that, and these prices were dated February 1, 1930, and applied to that product.

Q. Where did that cellophane come from?

A. Frankly, I don't recall. I believe Belgium.

Q. Now, what was your connection with the publication of these price lists? Did you have any dealings with them at the time they were published?

A. Yes.

Q. What were your duties in regard to the preparation of these lists and the mailing them out and the formulation of the lists?

A. Generally to arrange with our Advertising Department to have them printed and mailed out as early as we possibly could.

Q. Did you have anything to do with the preparation of the lists?

A. Yes.

Q. In what respect?

A. Copying our competitors' price lists.

Q. You did that, you say?

A. Yes.

4753 Q. For Sylvania?

A. Yes.

Q. Who established the prices?

A. Management. Our management.

Q. Who do you mean by management?

A. Well, during the earlier years Mr. Replogle as my immediate superior; subsequent to that, Mr. J. W. Little.

Q. Who told you to copy the competitor's price lists?

A. Either one or both.

Q. And then, as I understand it, you would copy it and give it to the Advertising Department and get it printed?

A. That is right.

Q. And arrange for it being mailed out?

A. That is right.

Q. Did these lists, Mr. Hamburg,—were they delivered to the customer on or before the effective date that appears on them?

A. No, sir, they were not.

Q. Will you explain your answer as to that?

A. Well, whenever there was a price change effected some of our good friends or customers in the trade would advise us and either deliver the prices or I would call for them. I refer to competitive price lists.

Q. You mean duPont's price lists?

A. Yes.

4754 Q. So a duPont price list would already be in the trade?

A. That is right.

Q. And you would pick it up?

A. Yes, sir.

Q. You would copy it on instructions from Mr. Little or Mr. Replogle?

A. That is correct.

Q. You sent it to get it printed?

A. That is right.

Q. And you sent it out to the trade?

A. That is right.

Q. Am I correct in understanding that the effective date was dated back to the date the duPont price list was effective?

A. That is correct.

Q. Now, in connection with the copying of the duPont price list, after you got it from the trade and sent it out, did you ever have any conversations of any kind with any official of the duPont Company concerning their prices?

A. No, I did not.

Q. Do you understand that is charged in this case by the Government that your company and duPont conspired to fix prices of cellophane?

A. I so understand.

Q. What have you got to say about that?

A. I can only speak for myself and to my knowledge.

4755 We were never aware——

Mr. MINICUS. Objection.

The COURT. Let the witness finish the sentence before you object.

Mr. MINICUS. I am objecting to the question, your Honor.

The COURT. What were you going to say, Mr. Hamburg?

The WITNESS. I for one, as far as I am concerned, there is no one in our organization, so far as I know, that had any inkling of any impending price change. They always came through the customers or prospects.

The COURT. What was your objection?

Mr. MINICUS. Now that he has answered the question I withdraw my objection.

The COURT. Proceed, Mr. Gesell.

4756 Mr. GESELL. I don't have any more questions except to have the witness identify these price schedules, your Honor, that follow from 1947 through, so that we have them identified at this time.

The COURT. Good idea. We were going to reserve ruling on that material. Why not do it while the witness is here.

Mr. MINICUS. We have no objection to the identification of them, but we are not going to move that they be admitted at this time.

The COURT. No, no.

By Mr. GESELL:

Q. Do you have those price lists there, Mr. Hamburg, that you mentioned that have been issued since the date of the last price list that you were shown?

A. I do.

Q. Can you hand them to me, please?

A. Yes, with my compliments (producing papers).

Q. Are they extra copies?

A. Yes.

Mr. GESELL. Can we have this group that have been handed me marked as a group as Exhibit 229-A, which will follow in sequence with the Government exhibits?

Mr. MINICUS. I don't understand, your Honor. Why should they bear a Government exhibit number? We are not
4757 offering them.

Mr. GESELL. If I can persuade your Honor, it is my position they may be, and I wanted to have them in the sequence.

The COURT. Credit them to me, if you want to. Simply have them marked for identification.

(Group of Sylvania Price Lists were marked "Government's Exhibit 229-A for Identification.")

Mr. GESELL. That is all.

Redirect examination by Mr. RENNINGER:

Q. Mr. Hamburg, I think you stated that the prices were determined after you received a copy of the duPont price list, is that correct?

A. That is right.

Q. Now, did this occur in every instance?

A. To my knowledge, yes.

Q. The price lists then—take March 2, 1931.

A. Up to 1947 you are referring to?

Q. Yes, from 1930 to 1947.

A. That is right.

Q. Take Government's Exhibit No. 205 as an example, August 1, 19[illegible]. How did you arrive at those prices in that price list?

A. Are you referring to No. 4-A?

Q. 7-A.

4758 A. As far as I can recall, we arrived at our prices as I have outlined befor[illegible] don't recall any exceptions to the rule. It was by copying the competitive price lists.

Q. You just copied the competitive price lists?

A. As far as I can recall.

Q. And the effective date of that price list was August 1, 1931?

A. I believe so.

Q. Take Price List 8-A, May 2, 1932, Government's Exhibit 207.

A. As far as I can recall, the same answer holds true?

Q. You got a copy of the duPont price list and incorporated those prices in your price list?

A. I believe so.

Q. What about 9-A, January 11, 1933?

A. The same.

Q. And 10-A, May 14, 1934—how did you arrive at the prices in that price list?

A. In the same manner.

Q. In other words, in every instance that Sylvania Industrial Corporation or the American Viscose—that is, the Sylvania Division of the American Viscose Corporation issued a price list from 1930 through 1947, it was a copying of the duPont price list?

4759 A. I might have to amend one of my replies, if you give me just a moment's time. I just recall that on Price List 16-L our price carried out to three digits, or to four places, I should say, and they might differ somewhat from the competitive list in that to my recollection they eliminated a cash discount, whereas our terms are still one per cent ten days, net thirty. So there might be a very slight difference of about one or two per cent on the list. I just happened to recall that.

Q. But with that exception——

A. With that exception we took the basic prices, and in this instance I believe we added one per cent.

Mr. Rennınger. That is all.

Mr. Gesell. No questions, your Honor.

The Court: Do you still object to the introduction of these 35 exhibits?

Mr. Gesell. I object unless the entire series is submitted, your Honor.

The Court. I do not think that affects the admissibility of the documents. I think that goes to the question of the weight and credibility I should give to them insofar as you think their incompleteness point to the inaccuracy. Therefore objection is overruled; the documents are admitted.

4760 (The Price Lists and Bulletins of Sylvania Industrial Corporation referred to were received in evidence and marked "Government's Exhibit Nos. 529, 194, 196, 197, 199, 201, 202, 204, 205, 206, 207, 210, 211, 214, 217, 219, 221, 223, 224, 226,

227, 228, 229, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, and 264," respectively.)

Proceed. Now, refresh my recollection. Take me back, Mr. Gesell.

4761 Mr. GESELL. I wanted to point out to the Court with respect to the series of capacity exhibits which we have already discussed, that begin with Exhibit 125 at page 419, I believe, and go on through that group that Mr. Minicus discussed, the relationship between the forecasts and the actual sales, because we have had no way of comparing until 395 came in, which appears at page 5488, whether these forecasts were excessive or under the market. Of course, when I was making quite a point of this we had not the statement from the Government that duPont had a Frankenstein by the tail and never could catch up with the demand, and that really is the point of my observation, that there was always plenty of poundage, in addition to what we were building for, which was available to anyone else, and that we were always behind, not putting capacity over the market which prevented others from coming in. If a comparison is made of 395 with these various forecasts, that becomes quite clear.

I will take a few examples just to make the point. On Exhibit 419 there is a forecast there that runs by six-month periods for four years, from '29 to '32. In '29 we forecast four million six and sold five million eight. In '30 we forecast six million four and sold twelve million six. In '31 we forecast at that time eight million six, that is, 1929, and by the time we reached '31 we were selling twenty-four million nine. In 1929 we thought in

4762 1932 we would sell eleven million eight. We actually sold twenty-seven million six. So that you see in all cases our forecasts at that time were far short of what demand there was that developed as we lowered the price, improved the quality and entered this competitive packaging market.

You will see it again in 125. In 1943 we were talking about a capacity we had of 100,000,000 pounds a year, and the increases just shot from that figure. In '46 it was 106 million. In '47, 132 million. In '48, 164 million. In '49, 177 million. And I don't think there is any point in my emphasizing this further except to say that if your Honor finds it is pertinent to determine the relationship between actuality and the forecasts, there is by the comparison of these two exhibits an adequate measure for doing so.

While we are on 395, I would like to point out one other fact which I have been emphasizing but which is shown there very graphically, and that is the great rise of moistureproof in relation to plain. In 1939 we sold roughly 6,000,000 pounds of plain and in 1950 we sold roughly 6,600,000 pounds of moistureproof. It had equaled, in fact past plain a little by 1950, which was very

early. The patent issued in '29. When we get down to 1949, we have plain at 17 million as compared to six, and moistureproof one hundred sixty million seven as compared to six. Now, if there is any question what the core of this cellophane busi-
4763 ness is, to use the phrases of the cases, or what is the primary product that duPont makes, it is the moistureproof, and the great dynamics of that invention are shown by those statistics.

That is all I want to say at this time, your Honor.

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4788 *3rd Trial Memorandum*

LEAHY, Chief Judge.

During trial the question was presented whether evidence of facts arising since the filing of the complaint on December 13, 1947, should be introduced or discussed. Defendant takes the position that where § 4 of the Act is in issue post-complaint evidence is admissible, and the decision on the merits should consider such evidence as of the time of judgment, i. e., this may be the time when the evidence is closed. Such procedure, it is said, has been established in five leading antitrust cases where post-complaint evidence had been admitted on the merits, on the basis that the date of judgment was the pertinent one for determining whether defendant had violated the antitrust laws.[1] Such admission of post-complaint evidence in antitrust proceedings, defendant point out, simply follows principles of the law of equity.[2]

4789 1. For a better understanding of this memorandum, note that the question arises on the presentation of the Government's case in chief. Moreover, it is necessary to distinguish between subsequent statements (post December 1947) which relate back to events occurring before the filing of the complaint, and acts and events (or interpretive statements in explanation) which came into existence after the filing of the complaint; the former, if not subject to other infirmity, are admissible during the trial at this time. In addition, the Government says it is not its position that acts and events, occurring after the filing of the complaint, are foreclosed from consideration, say, in drafting a final decree. Suspending, for the moment, the question whether post complaint evidence is admissible on the merits of the case, I am clear that, at this stage of the trial, such evidence is not

[1] U. S. v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 432; 445; U. S. v. Corn Products Refining Co., S. D. N. Y. 234 F. 967; U. S. v. United States Steel Corp., 251 U. S. 417; Standard Oil Co. v. U. S., 283 U. S. 163; U. S. v. National Lead Co., 332 U. S. 319.

[2] Randel v. Brown, 43 U. S. 405, 421; Brooks Bros. v. Brooks Clothing of California, S. D. Cal., 60 F. Supp. 442, 466; 19 Am. Jur., Equity § 411.

admissible in connection with the presentation of the Government's case in chief. Hence, if any of the documentary proofs, which the Government has already offered or will offer in the future, contain post-complaint evidence or statements explanatory thereof, no comment or argument is to be permitted with respect to such evidence by defendant.

4790 The issues pertaining to any action should be crystallized by the pleadings and by pretrial procedures. This seems specially apt to the trial of an antitrust suit involving complex facets of an industry under scrutiny. Thus, subsequently originated evidence is usually not probative of the basic facts alleged in the complaint. Such post litem motam facts go, at most, to remedy—perhaps, in some instances, to explanation of the basic facts by way of affirmative defense. But, clearly in the trial a bar any use made of such facts in connection with the Government's case in chief is premature.

2. The charge of monopolization, here, has a frame of reference from 1923 to December 1947, when the complaint was filed. Paragraphs 21 of the complaint and answer would seem to fix the ultimate probandum. Within this circumscription, the Government has the burden of proving a prima facie case of violation of § of the Act. This is the alleged violation within the issue joined and this would seem to be the confines of both parties, irrespective of the validity of any affirmative defense which I sedulously refrain from passing on, for the palpable reason I know not what texture such a defense may have when such proffer is made. The Chancellors recognized early that post litem motam evidence can possess functional importance, but such function relates

4791 to questions bearing on the remedy to be afforded by equity. Hence, facts and interpretive statements, occurring after December 1947, are not material at this time to the proof of the issue whether from 1923 to 1947 defendant dominated an unlawful monopoly in the manufacture and sale of cellophane in caps and bands.

This view was latent at the pretrial conference. The Supplemental Pretrial Order, dated October 11, 1949, discloses there would be a separate hearing on relief, in the event of a judgment in favor of the Government.[3] In fact, at pretrial, both parties proposed orders which contained a provision for a separate hearing on relief. The Government argues that at pretrial the designation—upon agreement of parties and order of the Court—for the purpose of proof and arguments on relief became the law of

[3] Paragraph 12 of the Order reads:
"12. Following the trial, in the event of a judgment in favor of the plaintiff, either party, for good cause shown, shall be given an opportunity to present evidence bearing on the appropriate form of relief after plaintiff has submitted its proposed decree."

the case[5] i. e., in the matter at bar there would be a bipartite proceeding, 1. proof would be addressed to the alleged violation of § 2 and, in the event of a decision for plaintiff on that issue, 2. a subsequent hearing or trial would be had of matters pertinent to the remedy.[4]

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3. The Government argues fully the case law in antitrust suits where the question of admissibility of acts and events or interpretive statements, occurring subsequent to the complaint, has arisen. The Government contends[5] the cases hold that evidence of facts originating post-complaint is incompetent to prove the issue of violation, as alleged in the complaint; and if such evidence is admitted, during the trial, it should be restricted to matters bearing on relief. Likewise, the Government refutes the

4793

alleged teachings of the five cases relied on by defendant[6] by pointing out there is no showing that the issue for decision here was ever presented for specific determination in any of those cases; and that, in addition, none of the five cases incorporated, within their trial procedures, a separate hearing on matters pertaining to relief, as was part of the plan for the trial of this cause. Whatever be the explanatory background of the cited cases, I shall not pause to consider them seriatim. For my purposes, at this time, I shall leave undecided any ideas of what evidence may go to remedy and will restrict my inquiries to testing the merits of the things which are concerned with the substantive offense as charged in the complaint and as it affects the Government's case in chief. Specifically, I have no present interest in the discontinuance of unlawful practices or what changes may have occurred in the industrial status which was brought to scrutiny by the complaint. In the trial of an antitrust case courts do not pause to weigh the element of mootness created by a change of circumstances. Changes in circumstances in this particular type of litigation, or by way of example in reorganization proceedings, are considered primarily in terms affecting the remedy. The broad design in the case at bar is whether proof shows

4794

defendant at the origin of this litigation was in violation of § 2 of the Act; and if it was, what proper remedial measures should equity apply under § 4. Proof as to these two items is clearly divisible. Certainly, with the intention in mind to simplify and expedite a difficult trial, I entered the pretrial order

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[4] The separation and trial of distinct issues is recognized by the Federal Rules of Civil Procedure, as a rational means of expediting a trial into two parts; for example, in a particular cause, where one phase of the case might never be presented for resolution.

[5] Lawlor v. Loewe, 2 Cir., 187 F. 522; U. S. v. Griffith Amusement Co., et al., C. C. H. Reg. Serv., 9th Ed., 1948–51, par. 62,772, D. C. W. D. Okla., — F. Supp. —; U. S. v. National Lead Company, 63 F. Supp. 513, 527; U. S. v. Libbey-Owens-Ford Glass Co., C. C. H. Trade Reg. Reports, Supp. 1948–51, par. 62,323; U. S. v. Besser Mfg. Co., D. C. Mich., — F. Supp. —.

[6] See n 1, supra.

of October 11, 1949, whereby ample opportunity is to be given defendant to adduce any post litem motam evidence it may marshall on the separate hearing of matters pertaining to relief, should that question arise as a result of a decision favorable to plaintiff on the issue posed by § 2.

4. For the present moment, passing a suggestion I have noted as to whether the post litem motam evidence might form the basic structure of an affirmative defense, I shall determine, at this stage of the trial, that argument and discussion, as well as proof, of matters which have a direct relation to the remedy should not be permitted to pervade the trial in connection with the introduction of the Government's case in chief. When the Government has rested on what it will urge is the establishment of a prima facie case, I shall then make a definitive ruling on whether voluntary discontinuance of the alleged unlawful practices or diminution of
the unlawful status may be considered as a part of an affirm-
4795 ative defense. At present, for whatever purpose the information may suggest, I think changes in the industry of the nature noted, may influence the texture and form of any decree if violation has been found; such elements, however, should not be permitted to prejudice the Government's right to a decree if violation has been established.

Wilmington.

4796 APRIL 3, 1951.

As of this date, the Court directed that the following statement be placed in the Record with appropriate pagination:

Statement

Briefs were filed in support of and in opposition to the Government's contention that acts or events or statements interpretive thereof which originated subsequent to the filing of the complaint are inadmissible. After defendant filed its brief, the Government was given leave to file a reply. Its brief was filed on the 30th day. Both briefs were adequate and fully covered the point for decision. Upon the filing of the Government's reply brief, due to the continuance of several matters on the calendar which had been scheduled for my attention, I had opportunity to read both briefs, examine the law, and consider the question for decision. I promptly wrote a 3rd Trial Memorandum deciding the question in the Government's favor. However, immediately following the filing of the 3rd Trial Memorandum defendant sought
a rehearing which I directed take the form of an applica-
4797 tion for leave to file a defendant's reply brief to the reply brief which the Government had theretofore filed and for oral argument.

1. I have studied the application for further briefs and oral argument on the issue already decided. No new and additional facts have been brought to my attention which could possibly change the hue of the question originally presented to me; and I have not been shown nor have I been able to find any intervening pronouncement of governing law which can be said to challenge the validity of my standing decision. I do not think further advocacy on the point, at this time, should be permitted simply to allow a restatement of old arguments. In short, no convincing statement has been brought forth to support a reagitation of the former factual and legal considerations to which I have given the best of my judicial attention.

2. At this point I wish to suggest the nature of this case is such that it must move along toward its destined end as steadily as the Court exigencies of this already crowded district will
4798 permit. The situation, here, is such I am required to refrain, as a nisi prius judge, from the judicial luxury of reading briefs on a contested isolated question—there have been and will be many more—making up my mind, writing trial memoranda, and then go over the field again by granting, in substance, rehearing on any contested matter after it has been once decided, then reading further briefs, hearing oral argument and, in effect, indulging in a repeat performance in order to satisfy whatever private doubts I may suffer as to the legal validity of my rulings and, in similar fashion, satisfy the conviction of counsel, either for Government or defense, that my trial rulings are conceived in error and should be corrected by me if justice is to be done.

3. After thorough consideration, it is, therefore, decided that the application for leave to file a reply brief and for oral argument, is denied. The 3rd Trial Memorandum for the reasons and purposes there stated will stand.

* * * * * * *

4800 *4th Trial Memorandum*

(Filed April 3, 1951)

LEAHY, Chief Judge.

In the course of the trial, both parties have argued, as to certain exhibits, the relevancy and materiality of comments by defense counsel to statements appearing in certain of the Government's documentary proofs relating to substitute products which are in competition with cellophane and caps and bands. It was agreed that at some stage of the trial the ultimate question would need be posed and decided. The Government has now presented the question for determination.

1. Whether references to flexible packaging materials and other materials outside the packaging industry, which may or may not be substitutional for cellophane are irrelevant and material to the issues of the case at bar within § 2 of the Act (15 U.S.C.A. § 2); or, 2. in the alternative, whether, under the precise allegations of the complaint, the Government must assume and meet a burden of proof that, as a question of fact, an indeterminable number of flexible packaging materials in the field of uses for cello-
4801 phane and caps and bands, are not in competition with defendant's cellophane products within § 2 of the Act—or, 3. whether the burden of affirming that such flexible packaging materials are, in fact, competitive with defendant's cellophane, is a matter of affirmative defense which duPont must assume.

2. DuPont argues there is only one basic question to determine at this time: Is all evidence as to the existence and effect of competition between cellophane and other flexible packaging materials inadmissible on the ground it is wholly irrelevant and immaterial as a matter of law to issues of marketing, market controls, or intent, as tendered by the complaint, in the charge of violation of § 2? If I should determine, argues defendant, the admissibility of such evidence, then defendant should be permitted to comment upon such evidence whenever plaintiff introduces any documentary proof bearing upon that issue. In this connection, defendant claims that it should be permitted in support of any motion it might make at the close of the Government's case, to comment upon any portion of the documentary proofs which shows the existence and effect of such competition as it relates to substitute flexible packaging materials.

4802 3. The Government has cited a number of cases interpreting the Act as foreclosing any consideration of the application of the doctrine of substituted materials. The time exigencies do not permit either a discussion or an analytical exposition of the precise decisions in those cases. I conclude those cases do not give total support to the proposition urged by the Government, viz., that all references to substitute flexible packaging materials are irrelevant and immaterial as outside the legal scope of the meaning of the words "any part" of commerce as used in § 2 of the Act. True, there are suggestions in the decisions, interpreting the congressional mandate, as to the legal strictures which must be applied in isolating what "any part" of commerce may be the subject matter of violation under the statute. But as stated, I shall not review the Court decisions, although I have read and given them consideration. For the most part, they contain statements written by appellate courts who obviously had in the records before them much testimony and documentary proof relating

to substitute materials in the various industries under investigation, which shows this type of evidence had been adduced before the nisi prius judge. As to the case at bar, I do not reject or accept a defense which will attempt to show the extent of
4803 monopolization by the utilization of evidence demonstrating competition by the manufacture and sale of similar materials which are bought and used by the purchasing public for similar purposes. Obviously, the precise question for determination, then, is what the order of proof should be. I agree with the Government's contention that the particular proofs which are the subject matter of this memorandum are not a part of the Government's case in chief.

4. Accordingly, it is my holding on this particular question of evidence that, since the complaint presents a market expressly limited to cellophane and caps and bands and, moreover, as defendant duPont is the proponent of the assertion that this market has been enlarged to include other substituted materials, in the flexible packaging industries, the burden of proof involved in any extension of the scope of the markets and identification of the products manufactured and sold to the public, should be considered, if admissible, a matter of affirmative defense. Hence, defendant should not be permitted to comment upon any such evidence whenever facts related thereto may be contained in any document which has been introduced by the Government; nor may defendant, in support of any motion made by it at the close of plaintiff's case,
comment upon any portion of the record that shows the
4804 existence and effect of competition created by the use of substituted materials.

Note by this memorandum that I am not deciding such evidence will be excluded from the case entirely. It is simply excluded at this time. While the admissibility of such evidence has been suggested, any question concerning the quality of such evidence or its effect in supporting a valid defense to the action is reserved.

The 2nd Trial Memorandum (Feb. 6, 1951) and the 3rd Trial Memorandum (March 15, 1951) are modified to the extent made necessary by the decision here.

Wilmington.

* * * * * *

4831 *Offers in evidence*

Mr. Mixers. That concludes our offer into evidence of the series of reports.

At this time, if your Honor please, I would like to take a moment to posit the present subject matter in the general case because of the circumstances of the lengthy recess.

Prior to the recess we had concluded the entire section of defendant's alleged power to regulate foreign commerce, and we had commenced the discussion of the defendant's position in the industry. Under that heading we had concluded the introduction into evidence or the identification of certain evidence addressed to the alleged dominance of the defendant at the production level of this industry.

Our immediate evidence and that which we were discussing at the time of the recess was addressed to what we have denominated the defendant's market control of this industry. And under that heading we had stated that we would treat market control for the purposes here under three specific headings, to wit, the defendant's predominance of sales in the industry; two, its control of marketing outlets; and, three, its power to effect the
4832 quantity and quality of the products involved in this action.

We pointed out that under the subject that we have now reached, that is, the control of marketing outlets, for the moment our evidence was addressed entirely to the problem of status—in other words, a discussion of the relationship existing between buyers and sellers of these products within the industry over the period of years covered by the complaint.

The means by which this status which we shall develop now was acquired will be considered by evidence introduced at a later point in the plaintiff's case in chief.

We further pointed out in order to frame this question of marketing outlets in its proper place that there exist in the sale of Cellophane a bipartite division of activities. In other words, Cellophane is often sold on direct sales. The salesman for the manufacturer goes out into the country, contacts directly purchasers and users of Cellophane who purchase the Cellophane from the manufacturer for the purpose of wrapping their particular commodity in the products.

Also Cellophane is sold on indirect sales. Briefly here indirect sales are accomplished generally through a middle man. The manufacturer sells to some person who is going to do something to that Cellophane before he passes it on the ultimate consumer.
4833 Under the heading of "Indirect Sales" which we had picked first for discussion in this general subject matter of control of marketing outlets we had discussed a single document, Government Exhibit No. 5047, at page 4558, which had been introduced into evidence, and in recapitulation now I would like to discuss certain of the salient points which the Government contends are contained in Government Exhibit No. 5047.

Initially, this document takes the position that duPont has always pursued a selective policy with regard to purchasers of cellophane. Thus converted distribution and the number of out-

lets for duPont cellophane was restricted and controlled. In other words, although the defendant controlled in excess of 75% of the total supply of these products, it sold to only a few selected middlemen in the indirect sales activities. Among these middlemen purchasers for conversion particularly were very narrowly limited.

Now, it is our position, and we believe that this document supports that position, that duPont has dominated converting outlets for cellophane. There are several classifications of converters. The first, as established by the documentary are those called promotional converters. These are bound to the defendant by exclusive contracts to buy all of their requirements from duPont. The second group of converters is the 100% of duPont con-
4834 verters. These are the promotional converters under the exclusive contract, but at the same time they did purchase all of their requirements for conversion from the defendant. Finally, there exists a group of two-source converters. These purchased their requirements from both duPont and Sylvania. That triple breakdown there is designed to cover the converters buying their cellophane from duPont. Sylvania also had a similar setup for distribution of their cellophane in the conversion fields.

Now, duPont's promotional converters were the recognized leaders of the industry. These promotional converters, whom we maintain were bound to the defendant by an exclusive agreement, were the giants of the industry, and they collaborated very closely with the defendant. Sylvania's promotional converters were much smaller and less desirable accounts. When a Sylvania converter achieved outstanding prominence, duPont signed him up. Thus Sylvania was able to maintain only about 20% of this conversion business. The defendant discouraged entering into the industry by converters, and because of its predominent control of supplies this effectively controlled the converters. In large degree the purpose here was a protection of duPont's exclusive customers from vigorous competition by other converters who might come into the field. Thereby duPont's handling of its selective policy summarily foreclosed many persons desirous of coming into the industry of the conversion of cello-
4835 phane. Persons desiring to convert cellophane were systemmatically rejected by duPont. In those cases where a prospective converter was able to acquire cellophane from Sylvania's limited quantities, he was taken over by the defendant whenever he established a reputation in the industry.

Another point, we maintain, that is established by this document are those advantages accruing to the defendant from this selective policy. The policy, of course, grows out of duPont's predominent control of supplies, and was one of the means by

which the defendant was able to tie the leading converters to it in these exclusive arrangements. In addition, the document points out that duPont provided its promotional converters with special services. DuPont's promotional converters constituted the bulk of its conversion business. In about 1940 about three-quarters of all of its tonnage going to converters went to these promotional converters.

In the absence of a selective policy the defendant believed that the time of its salesmen—and I quote from the report now—"would be wasted on competitive complications." In the absence of the selective policy the defendant believed that competition would replace collaboration. The exclusion of new converter outlets kept the existing large promotional converters satisfied.

The report concludes with the following statement:

4836 "In addition to establishing a broad program of sufficient flexibility, we propose to carefully consider each case as it presents itself (such as Cuneo), and decide on its individual merits—its fitness to contribute to the general plan, its effect to our business as a whole."

Continuing with the documents discussing the control of indirect sales outlets, I might point out to your Honor that the heading is found in our trial brief, paragraph 61, and in the index at Roman numeral I (c) and I (b).

The Government offers in evidence Government Exhibit No. 432 at page 5689—I am sorry, this is admitted in evidence. I am inviting the Court's attention to it at this time. We are beginning with this document because it brings the picture back to the early stages of the converting business in the cellophane business. The document is of 1929, and your Honor's attention is invited to page 12 of the report which is also at page 5700 of the bound exhibits.

Reading from the beginning of the page, 5700:

"Summary.

"The analysis of individual accounts regained seems to stress the importance of the part printers and fabricators of Cellophane are playing in the Transparent Cellulose Sheeting Industry. We believe Du Pont direct sales to the accounts regained from the competitor is a comparatively small indication of the relative gain of DuPont in the industry.

4837 "There is a tendency among manufacturers, particularly those in the meat, candy and baking industries, to adopt printed Cellophane in preference to the plain wrap. In addition to enhancing the beauty of the package, it permits the elimination of an insert label which has been the usual means of identifying a manufacturers product.

The increased use of fabricated Cellophane is reflected in DuPont sales to the manufacturers doing this work.

"At the present time our competitors are unable to get any of this business. There are manufacturers printing or fabricating competitive material."

Therefore in the very early days of the development of this converting business, this document establishes the fact that duPont then had all of it.

The Government offers in evidence Government Exhibit 5040, at page 4524. This is a quarterly report, Second Quarter of 1940, Converter Section, Indirect Sales.

(Quarterly Report, Second Quarter 1940, Converter Section, Indirect Sales, was received in evidence and marked "Government's Exhibit No. 5040.")

Mr. MINICUS. This document brings the picture of the converter situation forward to the year 1940. By this time the conventional categories of purchasers securing their cellophane on indirect sales had reached full development. We
4838 will note in the document itself that now the indirect sales section of the Cellophane Division sells to agents, converters, fabricators and jobbers.

I commence reading at page 4524:

"Growth continues well balanced

"The trend of progress developed in the first quarter was duplicated and exceeded in the second. Sales of 'Cellophane' to Agents, Converters and other Indirect Sales outlets increased 14.4% in the second quarter over last year compared to 14.2% for the first three months, resulting in a half year total gain of 14.3%.

"Compared to Direct Sales, which increased 8.6% in the first half, progress made through Indirect Sales sources was noteworthy as every division of Indirect Sales volume exceeded the rate of increase for Direct Sales. Combined sales volume of Promotional and other Converters increased 15.4%, Fabricators 9.4%, Industrial Users 13.6%, Agents 12.1% and Paper Dealers 22.8%.

There follows a summary of the six months picture as to these various outlets which I will not read.

I commence reading at page 4525, or page 2 of the report:

"Promotional Converters Lead in Volume Expansion

4839 "Although increases were widespread in the converter classification, Promotional Converters made particularly noteworthy progress, as shown by the following figures covering

a representative group (our largest Promotional Converters) for the first six months:

Shellmar	396,862 pounds increase.
Milprint	395,928 pounds increase.
Washua	173,724 pounds increase.
Dobeckman	99,972 pounds increase.
Traver	29,959 pounds increase.
Total	1,096,445 pounds increase.

"Volume secured from these five Promotional Converters represented 77.5% of total converter volume but accounted for 96.8% of the total gain for the classification—clearly indicative of the results of our program of close collaboration.

"Strong support continues to be given the Promotional Converters in all possible directions both in the field and in providing promotional assistance. The 'Cellophane' Division's film 'Food For Thought' has been shown to all headquarters groups (excepting New England) in series of meetings. Over 200 salesmen and executives of our Promotional Converters have seen the film and acquainted with its cooperative use in building converter business. In addition, presentations have been made of our Christmas program to stimulate activity on holiday items."

4840 "Among other Promotional Converters, the Caton Printing Co., also The Munson Bag Co., have shown very satisfactory progress. Hemitube Manufacturing Co. has made a small gain, while Cupples-Hesse Env. & Litho. Co. is off about 5%.

"The Dennison Manufacturing Co. is the only Promotional Converter whose purchases have shown a sizeable decrease, accountable in part by an inventory situation and delayed placement of Christmas orders by the trade.

"Sizeable Gains also with Non-promotional Converters

"American Paper Goods Co., entirely competitive until October 1939, is responsible for an increase of 24,233 pounds. Bemis Bros. Bag. Co., Betner Co., Celluprint Corp., Detroit Wax Paper Co., Diaphane Bag Co., Forbes Litho. Co., Marathon Paper Mills, Print-A-Tube Co., Thos. M. Royal Co., Union Bag & Paper Co., Whiting-Patterson Co.—all have contributed varying gains.

"Continental Bag Specialities Corp. (Oneida) has represented the only sizeable loss, having a six months drop in purchases of 42,687 pounds, a large part of which is considered to be a competitive loss. U. S. Envelope Co., off 65,654 pounds, has lost business to other converters, also with the possibility some of our loss may have been competitive.

"Agents

4841 "Zollerbach leads the other Agents with a gain of 168,859 pounds in the first six months, a continuation of this organization's growth, particularly in the baking industry, which accounts for 70.0% of Zollerbach's distribution.

"H. D. Catty Corporation's purchases increased 196,313 pounds; Brooks Paper Co. 114,277 pounds and Morgan Ellis Co. made commensurate progress.

"Paper Dealers

"For the sixtieth consecutive month, sales to Paper Dealers show an increase over the corresponding month of the previous year.

"Fabricators

"Although sales to fabricators in the first quarter increased only 4.5%, second quarter gains were sufficient to bring the half year rate of increase to 9.4%.

"Minnesota Mining & Manufacturing Company, the largest account in this classification, having had a steady increase in demand for its pressure sensitive tape, increased their purchases in the first six months by 26,567 pounds. This represents a rate of gain closely in line with the average for the group. The situation among the various sub-divisions of the Fabricator classification is mixed.

"Manufacturers of hand-fold envelopes show moderate progress. Celluecraft Co. and Everett Sales & Equipment Co. continue to run ahead while Clearview Env. Co. and Comet Env. Co. show
4842 partially offsetting decreases. Ribbon and cord producers also show moderate improvement, the gain with Freydberg Bros. Co. of 15,601 lbs. offsetting the declines of Fibre Cord Co. and Du Tone Ribbon Corp.

"A slight decrease is noted in volume of manufacturers of garment covers and display bags—rubber film still having the upper hand in this field."

Mr. GESELL. Now, your Honor, if you please, I took it that your Honor's opinion applied to both of us with respect to this matter of competitive materials, and I think that Mr. Minicus should be enjoined against discussing it as well as I.

The COURT. I will accept Mr. Gesell's statement as a question from the Court to you, Mr. Minicus. What about it?

Mr. MINICUS. I quite agree that it is not our intention to discuss or make a point of any of these matters. Sometimes these things are in the documents. A simple statement such as this one here certainly should be read along with the document rather

breaking the document up—particularly the context of the statement is not prejudicial to the defendant's case.

The COURT. But where are you going to draw the line? That is the point.

Mr. MINICUS. I didn't anticipate that a point of this nature would arise. It isn't that we intend to discuss this matter
4843 at all but if it will help matters we will edit each one of these documents and wherever we find a simple statement like that, we can strike it.

The COURT. Well, it seems to me you have selected your techniques and you ought to follow them. Why read it if it has no pertinency according to the theory of your case? That is the point Mr. Gesell is making. He says he wants this sword to cut both ways. I agree with him.

Mr. MINICUS. I agree with him, too; I take no issue with that point. As I say, the statement is so slight in here, it perhaps has no pertinency to the case; but the entire document itself, you see, is designed to show the breakdown of these various classifications and identify certain of the leading people within those classifications and also specify the kind of business that those particular buyers of Cellophane do.

Now, we were not intending to make a point of this at all, and as I said, it was not prejudicial to the defendant's interests in the case at all and for that reason the statement was not deleted. We will take care of that matter in the future, your Honor, and will attempt to delete all statements of that nature in our reading.

The COURT. Very well, proceed.

Mr. MINICUS. "American Garment Cover Company, however, reports sales of its scrim laminated cover to be satisfactory—this chain store item accounted for over 100,000 yards of material in April."

4844 Mr. GESELL. That is more of the same, if your Honor please. These documents are full of this material.

Mr. MINICUS. Just a moment now, if your Honor please. That reads, "American Garment Cover Company, however, reports sales of its scrim laminated cover to be satisfactory". Now, scrim laminated covers obviously from the reading of that are something laminated to Cellophane. Certainly there Cellophane is a product and these people are buying Cellophane for that purpose. I think that this is an obvious attempt to confuse the issue. I will go along with the defendant on the first statement, but if every time Cellophane happens to come in contact with something else—there is no question of competition here; the people simply bought Cellophane to laminate it to another product. We have a great deal of material coming in later on in our case on laminations. It is not

the competitive element; it is the purchase of the Cellophane, no matter what purpose they are going to use it for.

The COURT. I do not know. Suppose the Cellophane becomes an integral part of an article which might properly be denominated as a substitute material? Where do I draw the line? I do not have enough technical knowledge of the packaging industry to pass on this point, but I think I see a caveat about this particular type of sale that you are about to discuss. Suppose you describe to me by way of illustration what would be the product, the
4845 end product which you have just referred to.

Mr. MINICUS. I regret, your Honor, that in all the work I have done in the Cellophane industry, this is the only time I have come across the expression "scrim laminated cover."

The COURT. Well now, if you do not know and I do not know, I do not know what progress is going to be had.

Mr. MINICUS. I think this main point will develop under other laminations. For example, there is a foil lamination.

The COURT. Well, I think progress must be made, so you proceed; and at what you consider the appropriate point, Mr. Gesell, if Mr. Minicus has not fulfilled his promise, then you renew your motion, and if necessary I shall strike such material as has been discussed with respect to this particular item.

Mr. MINICUS. Continuing to read——

The COURT. You have been talking for an hour and a quarter. How about a recess?

Mr. MINICUS. Thank you, your Honor.

The COURT. Recess for ten minutes.

(At this point a short recess was taken.)

4846 Mr. MINICUS. With regard to Government Exhibit No. 5040, we will resume our reading with the third full paragraph at page 4528:

"Several novelty manufacturers of Christmas bells, balls, wreaths and garlands have already started to order in substantial quantities and present indications are that this year's volume will far exceed any previous year."

I resume reading under the heading "Industrial Users" on page 4528:

"Principal increases in this classification have come from window box manufacturers. F. N. Burt Co., producing boxes principally for the cosmetic trade, shows an increase of 10,639 pounds, while W. C. Ritchie Corps., active in the same field, ran even. Many other window box manufacturers showed progress, among which are Berles Carton Co., Consolidated Paper Corp., Empire Box Co. (up nearly 10,000 pounds), Robert Gair Co., Gardner Richardson Co., Grant Paper Box Co., Great Lakes Folding Box

Co., Hub Folding Box Co., Interstate Folding Box Co., and Sutherland Paper Co. There were some offsetting decreases.

"Ivers Lee Co., operating a packaging service, contributed a gain of 13,028 pounds.

"*General*

"To date 32 Converters, Fabricators and other users of our standard 'Cellophane' label have signed our agreement
4847 on its use, further establishing control over indirect distribution."

As I previously pointed out, the Government has proferred this document primarily to show that in 1940 the standard breakdown within the group of indirect buyers—the conventional groupings had pretty well developed. We noticed first the converters who were stated to represent over 60% of all indirect sales, and we noticed that Shellmar, Milprint, Nashua, Dobeckmun, and Traver are extremely important in that group among the promotional converters. We noticed that there are two-source converters and 100% duPont converters. We also noticed the development of another group that are denominated by the defendant as agents. Their function is primarily that of wholesaling of film in this indirect sales setup. These agents of the duPont Company—and they are a rather fixed group—remain just about under the same identities as they are presented here, and those are Zellerbach, Catty, Brooks, and Ellis.

Now, the fabricators perform a function of shaping cellophane other than the functions performed by the converters. This may best be illustrated by examples Minnesota Mining & Manufacturing Company was listed under the fabricator group, and they produce, of course, what is known under the trademark Scotch tape. Freydberg Brothers was pointed out as a fabricator,
4848 and they purchased cellophane to manufacture ribbons.

Then we had the envelope and garment bag manufacturers also under the heading of fabricators. Then we have another classification called the industrial users. The functional distinction between industrial users and fabricators appears to the Government even more shadowy than that which distinguishes fabricators from converters. However, we do note that listed primarily under "Industrial Users" are the window box manufacturers. There is also another classification that is dealt with rather summarily in the report and they are the jobbers or paper dealers. The Government relies particularly on the last statement of the report read into evidence.

The Government offers in evidence Government Exhibit No. 5046 at page 4555. This is also a document of 1940, which is dated November 5, 1940, at the end of the year.

(A paper dated November 5, 1940, was received in evidence and marked "Government's Exhibit No. 5046.")

Mr. MIXICUS. Here we have the chronological development of duPont's converters beginning in 1925 with the American Paper Goods Company and showing the particular converters who entered the system for each s. cessive year thereafter down through 1940. An understanding of this chart is better achieved by appreciation of the fact that duPont's promotional converters are designated by an asterisk in the chart. Those on the first
4849 page, Milprint, Shellmar, Caton, Dobeckmun, Traver, Humitube, Nashua, are all preceded by an asterisk, and that denotes the fact that they are duPont promotional converters.

Then the duPont 100% converters are set up entirely in caps, without the preceding asterisk. Finally, the remaining are either two-source converters or Sylvania converters.

An interesting statistic concerning this chart, if one notes the amount of purchases by three of duPont's promotional converters, to wit, Dobecknmn, Milprint and Shellmar, in the year 1940 it will be noted that those three promotional converters consumed more cellophane than all of Sylvania's 100% converters.

The Government offers in evidence Government Exhibit 82 at page 311. That has been offered already. Attention is now invited to it.

Turning to page 3 of the report, or page 313 of the bound volume, we find in the third full paragraph under the heading "Converters"—and this relates to the year 1941:

"Du Pont maintained its exclusive position with the largest converters and made a series of gains with second rank accounts, including American Paper Goods Company, Continental Bag & Specialties Company, Cuneo Press, Forbes Lithographing Company, Marathon Paper Mills, Union Bag & Paper Company
4850 and Whiting Patterson, losing ground only with one converter of size, Thomas M. Royal."

The Government now offers three exhibits as a single group. These are Government Exhibits 5050, at page 4580; Government Exhibit 5038, at page 4519; and Government Exhibit 5037, at page 4547.

(The papers referred to were received in evidence and marked "Government's Exhibits 5050, 5038 and 5037," respectively.)

Mr. MIXICUS. These three exhibits really present the picture in a single document and are a study of the competitive situation affecting converters on or about August 24, 1942.

Reading from the first page of the exhibit, which is a memorandum from H. O. Ladd to J. E. Hatt:

"Subject: Competitive Situation—Converters.

"The Converter Section has now completed its field check of the competitive situation with converters and necessary revisions have been made in preliminary estimates. This field check included coverage of practically all converters covered in the original study and estimates for those not contacted were secured from Catty and Shellmar for comparative purposes with our original calculations. The figures which follow, therefore, represent a consensus of opinion of Messrs. Lake, Robbins, Bandy, Farrell (Catty), Moore (Shellmar) and the writer.

4851 "Revised figures follow (000's lbs. omitted) :"

Then follows a chart that indicates that at this time for the first six months of 1941 duPont had 80.7% of the converter business, and for the second six months of 1941 they had 80.2%, and for the first six months of 1942 they had 82.0%.

I commence reading midway down the page:

"It is evident we over-estimated both Sylvania strength and growth with converters in our original estimates.

"That we erred on the liberal side is not unexpected. In developing original estimates, the effort was made

"(1) to concede to Sylvania every pound that could possibly be done with facts at hand.

"(2) to consider that Sylvania had not been affected by L-20 beyond places where the evidence was believed absolutely conclusive.

"You will note the revised figures indicate we have actually improved our position in the converter field in the first six months of 1942."

Thus we have the dominance in this converter field persisting through 1942, at which time they possessed in excess of 80% of the converter business.

4852 The Government requests attention to Government Exhibit No. 85, previously admitted in evidence. It appears at page 324 of the bound reports. On page 3 of the report, or page 327 of the bound volumes, the first full paragraph at the top of the page, this shows for 1943, "Little competitive change occurred in the converter classification. Converters of duPont film held a dominant position in the supply and development of converted materials, especially those designed for Government and metal-replacement uses. Laminations of Cellophane to itself * * *"

Mr. GESELL. Aren't we again into our problem?

Mr. MINICUS. Yes. I think this should be settled, your Honor. This question of laminations, your Honor, is quite easily distinguishable from that of substitutional materials. A lamination involving Cellophane—and we will speak of no laminations

other than laminations involving Cellophane—presents a coordinated function. The Cellophane and some other material, whether it is scrim or foil or cellulose acetate, is joined, usually by an adhesive, to the other product.

The COURT. Well, to get to the quick of the matter, would you say that generally it falls into the same category as Minnesota Mining Scotch Tape?

Mr. MINICUS. Yes, sir, I do, because of the different function that is produced through the conjunction of the two
4853 materials. It is not a question of a substitution at all. It is very similar to combinations in the patent law where we get the emergence of a new mechanical facility, but it is not a substitute by any means in that sense, and we are not presenting it as competitive. We are showing that these people are buying it for the purposes of laminating it. Suppose you take a piece of Cellophane and print on it, it is a different material. Things have to be done with this Cellophane after it is purchased.

The COURT. Well, do you want to have argument on that point, Mr. Gesell, that it is or is not within the substituted material class or is simply another use for Cellophane as such? If so, I will be glad to hear you.

Mr. GESELL. Well, whatever your Honor's convenience is. I think there are many other problems of this kind coming along and perhaps if we simply note them once in a while, the Court might be better able to deal with them a little later.

The COURT. Fine. I agree with you.

Mr. GESELL. I don't want to interrupt Mr. Minicus' presentation.

Mr. MINICUS. Thank you very much. I appreciate Mr. Gesell's handling of the matter but I would like to say, aside from the field of laminations I don't think this problem is going to come up.

The Government offers in evidence Government Exhibit
4854 5531 at page 6327. This is a 1944 memorandum very similar in its composition to one previously submitted as Government Exhibit 5046. It is for the year 1944, whereas the other one was for the year 1940.

(Document headed "Converter Industry Development (Printers, Bag and Envelope Manufacturers), Chronology of Inception by Years, as of December 31, 1944," was received in evidence and marked "Government's Exhibit No. 5531.")

Mr. MINICUS. By this Exhibit No. 5531 we have an opportunity to observe the growth of this converter system in the four-year interval. It starts, as did the other, with 1925, and the American Paper Goods Company is the first converter. Then it shows the chronological progression through the various years as different promotional converters, 100% converters and two-source convert-

ers, were added. But it goes beyond 1940 and continues through 1941, 1942, 1943, and so on.

Now, this document does illustrate the fact that over the 1949 figure, which represented 17 promotional converters within the Du Pont system, that number is now increased to 62 promotional converters. So there has been quite an increase in the number of these promotional converters in that four-year period. The 17 is derived from Exhibit 5046.

In regard to 5046 in comparing it with the exhibit now at hand,

4855 I request attention to page 4557 of 5046 where at the bottom of the tabulation, past the year 1940, we see that Du Pont had 14 promotional converters at that time and that the value of their business to Du Pont was 15,500,000 per year.

Then below that we see a heading "Other 100% Du Pont Converters," and we notice there a very small group, only 480,000.

Then the two-source converters for Du Pont, the business was 2,381,000, and Sylvania's was very close to it, 2,431,000. So among the two-source converters, although the business was relatively small in proportion to the promotional converters, both producers shared about an equal amount.

Then we have Sylvania converters that were entirely Sylvania business, and there we find 2,551,000 as compared with 15,500,000 of the Du Pont promotional converters.

So in leaving Government Exhibit 5046 we now see that in 1944 the number of promotional converters has been increased to 62.

The Government offers in evidence Government Exhibit No. 5152 at page 4760. This is a memorandum from H. C. Broems to W. J. Harte, "subject: Shipments to Converters," and the date is February 4, 1946.

(Memorandum from H. C. Broems to Mr. W. J. Harte, subject: Shipments to Converters, dated February 4, 1946, was received in evidence and marked "Government's Exhibit No. 5152.")

Mr. MINICUS. On page 7 of this report or page 4766 of the

4856 bound volumes, the next to the last full paragraph on the page sets forth the condition in the converter field in 1946:

"For the present and long range interests of our company, we should control Cellophane distribution, to the best of our ability. If we increase converter allocations and permit uncontrolled expansion, we have no assurance this tonnage is placed to our best interests. On the other hand, our present sales program does provide intelligent placement of poundage and we do not think it should be disturbed now."

The Government offers in evidence Government Exhibit No. 548. This is another exhibit, your Honor, that is not in the bound copies. I submit two copies for the inspection of the Court and one to

the defendant. I believe they have already received copies of these.

(Document headed "Table No. 13, Percentage of Du Pont's Total Sales to the Important Industry Classifications," was received in evidence and marked "Government's Exhibit No. 548.")

Mr. MINICUS. This table, titled "Table No. 13, Percentage of Du Pont's Total Sales to the Important Industry Classifications," is part of the material that I informed the Court would be drawn from the long series of reports that we put in this morning. The source material, unless otherwise designated in the footnotes, is found at the heading of each column, the "GX" referring to Government Exhibit.

4857 In the column at the extreme left-hand edge of the paper, we find particular trade classifications, and they proceed along through the years from 1935 through 1947.

It will be noted that the first two classifications, to wit, cigarettes and baked goods are boxed off. They, of course, represent the sales made to cigarette manufacturers and bakers on direct sales. Then a sub-total is drawn from that and there follows a listing of converters, agents, fabricators, and industrial users, and jobbers. That, of course, comprises the entire group under the generic heading of indirect purchasers; then another sub-total drawn from that group; then the total percentage is shown.

Following that we have Du Pont's annual yearly total production, then the total promotional converter sales, and the total converter sales.

Now, the purpose of this chart is to demonstrate the principal marketing outlets for Cellophane according to trade classifications for the years covered by the chart.

Mr. GESELL. Well, with that statement I object to the chart, if your Honor please. It does not show the principal outlets. This chart does not show the total direct sale business. The purpose here is to distort the statistics by making a comparison between two lines of direct business with the converter business, whereas if all lines of the direct business are included, the percentages would be substantially different.

4858 The COURT. And where would that show, Mr. Gesell?

Mr. GESELL. You see, he has included only cigarettes and baked goods in his direct heading. Those are only two of many lines of direct sales and he has compared them with all of the other lines of business, converters, agents, fabricators, and jobbers. That shows a decline in the direct items and an increase in the indirect items, whereas if all the direct items were included, the percentages would be the other way around.

Mr. MINICUS. I think I can answer that, your Honor, if I understand Mr. Gesell's objection.

If we turn to the last column on the right-hand side, which is for the year 1947, we find that cigarettes and baked goods have a subtotal of 34.67 per cent, and then following that column down to the subtotal drawn for the indirect sales, we find that we attribute 45.1 per cent to indirect sales, and the grand total below that is 79.77 per cent of all Du Pont Cellophane sales.

Now, I think it is a very easy step of inference to realize that the balance, inasmuch as we say that we have introduced all of the indirect sales, that the balance between 79.77 and 100 per cent is what represents the remainder of the business on total direct sales other than cigarettes and baked goods. So I don't think we have distorted it at all.

Admittedly, if the indirect sales as shown under the year 1947 are 45 per cent, then all direct sales are 55 per cent—
4859 and I intended to bring that out in a minute—of which 55 per cent, 34.67 per cent is represented in these two categories. So I don't think there is any distortion here.

The COURT. Well, why do we focus on cigarettes and baked goods? Why is that of any importance insofar as this case is concerned than the other items in question?

Mr. MINICUS. You see, these do come under the direct sales section, and we have just completed the indirect sales material now. Now, under the direct sales we are going to show that certain large accounts, the business for certain large accounts was dominated by the defendant. If we take cigarettes alone, we see that 15.4 per cent of all of the Cellophane business done by Du Pont in that year went to cigarettes, and that 19.27 per cent went to baked goods, and that the total of the two represented almost 35 per cent of the total Du Pont business in those two direct industry classifications.

The COURT. Well, were there any other items which were the subject matter of direct sales?

Mr. MINICUS. Oh, a great many of them, your Honor.

The COURT. Why are they not noted?

Mr. MINICUS. Because there are so many and they show such a small proportionate share, one, two, three, four, five per cent at the most on the others, that the chart would have been an extremely lengthy thing—and we are admitted drawing atten-
4860 tion to the fact that in the direct sales field cigarettes and baked goods dominate all the other classifications which are very minor.

Mr. GESELL. Well, you have broken down fabricators here, Mr. Minicus, and their sales are not probably as much as the sales to the candy industry direct; you do not show the sales to the candy industry direct at all, and I say it is a distortion of the statistics, your Honor.

Mr. MINICUS. We have shown fabricators there, that is quite true. We have shown all of the indirect purchasers. When we say agents, converters, fabricators and jobbers, we admit that that is all of the indirect business, and we have shown the two largest industry classifications as marketing outlets for direct.

The COURT. Other items covered by direct sales must be packaged by someone else if the figure is low, and to that extent wouldn't that go to the question of whether there is monopoly or competition? In other words, you say there are several items which could go into the classification of direct sales. Well, if Du Pont has, according to your view, an infinitesimal portion of that market, isn't that going to furnish some light as far as I am concerned on this monopoly that you charge?

Mr. MINICUS. Certainly, your Honor. Let me point out that we are not attempting to hide anything here. You see, the
4861 source for this material, GX 501, is indicated at the heading of the column, and I have before me now GX 491, which is the heading of the second column, and in the back here, at page 6523, which is designated as the source material for this chart, there is the complete layout of the whole thing. You see that we could have just taken it off and had quite a large chart here, but our purpose was only to show the preponderance of the business done in cigarettes and baked goods, but we have this in evidence and a reference is made to it.

Now, if we will look at that (page 6523), we will find the following breakdowns at the right-hand column, cigarettes 24 per cent, cigars 5, other tobacco products 3, then candy 6, baked goods 22, meat products 1, noodles and macaroni 1, tea and coffee 1, unclassified food products 2, textiles 1, hosiery one, perfume 1, drugs 1, rubber goods 1, paper products 2, unclassified 2, millinery braid, less than 1, and so it goes. In other words, there are a great many classifications of 1 and 2 per cent. That is our very purpose, to show that probably out of 15 or 20 classifications on direct sales, cigarettes and baked goods in 1947 accounted for almost 35 per cent of the total business, leaving 21 per cent for the other classifications. That is exactly what we are attempting to point out. And that material is all in evidence, and there is a reference to it at the heading of this compilation.

Mr. GESELL. Well, if he wants to make an argument, I do not see that we have to make an exhibit out of it. If he
4862 wants to make an argument of some kind—this is coming in as an exhibit.

The COURT. I am going to allow Government's Exhibit 548 into evidence subject to the caveat raised by Mr. Gesell as to whether or not it accurately reflects the substrata basic material upon which it is based or whether it is more in the nature of

advocacy in putting undue emphasis on certain items without bringing out the same evidence as to other items contained in the basic material. That would seem to me to result in becoming a part of argument at the proper time.

Nevertheless, Mr. Minicus, keep on GX 548, and if you consider you have already made your point, I will have to ask you to repeat it because I have not got the significance yet of what it is you think lies in these figures.

Mr. MINICUS. The chart is designed, one, to set forth the proportionate participation of the various indirect buyers according to their classification, together with the participation by two major outlets on direct sales. In other words, under indirect sales we see that for 1947 indirect sales accounted for 45.1 per cent of all Cellophane sold by duPont. In other words, 45 per cent of their Cellophane went either to a converter, agent, fabricator or jobber, and that within that heading of 45 per cent, the converters took 33.35 per cent. In other words, in the grouping of indirect buyers converters were predominantly important.

* * * * *

4868 Mr. GESELL. If your Honor doesn't mind my clarifying
the point, this exhibit shows that the principal converter
4869 of Viscose is Shellmar, the very company that Mr. Minicus has been saying we corraled; their business is running up over a half million dollars. It also shows substantial sales of Viscose to Dobeckmun, another one of the companies. So my simple point was that both of those concerns are selling some of these larger accounts in substantial amounts.

Mr. MINICUS. The Government submits in answer to Dobeckmun's sales, particularly, and certain other sales made to promotional converters during the war years—this does not apply to Shellmar; they did break away and gave some of their business to the Sylvania Company, but the others, Dobeckmun and certain others, if I go back to the exhibits which I have introduced in evidence, it will become quite apparent, were buying cellophane during the war years from Sylvania, and that was entirely war business attributed in large extent to the shortage of cellophane at the time, and, secondly, to the fact that there was one war product for which cellophane was deemed quite important. It was a cape, a gas-protective cape, which I understand fit entirely over the clothing of the soldier to protect him from possible gas attacks.

The COURT. I have your point. I don't need any more discussion on that particular phase of what apparently is a minor controversy.

Recess to 2:15.

4870 (At this point a recess was taken to 2:15 p.m., the same day.)

2:15 O'CLOCK P. M. THE SAME DAY.

Present: As before noted.

Mr. MINICUS. We have concluded our discussion of Government's Exhibit 414, the purpose of which was primarily to point out who and to what extent they were the important Sylvania customers on direct sales. There is also included therein certain material relating to the previous section, indirect purchases as they relate to Sylvania Corporation. We will not read that at this time, although we will rely on it for reference.

The Government offers in evidence Government Exhibit 5001, at page 4409.

(The letter from L. A. Yerkes to J. E. Hatt, dated December 10, 1934, with attached report, was received in evidence and marked "Government's Exhibit No. 5001.")

Mr. MINICUS. Basically this is a report of the competitive position on plain sheeting sales and is preceded by a covering
4871 letter from Mr. Yerkes to the Board of Directors of the Du Pont Cellophane Company, Inc., on December 18, 1934. The subject of the letter is "Competitive Position of 'Cellophane' in Sale of Cellulose Film."

It reads:

"At our Board meeting, held on October 4, 1934, we reviewed a report covering an analysis of our apparent loss in competitive position of moistureproof 'Cellulophane' since granting a license in April, 1933 to the Sylvania Industrial Corporation under our patents applying to moistureproof cellulose film. It was then unanimously agreed that it would be interesting to see the results of a similar study with respect to the competitive position of regular 'Cellophane.'

"We are accordingly sending you herewith copy of report covering the relation of our regular 'Cellophane' to the sales of plain sheeting by Sylvania."

Now, turning to the basic report itself, reading beginning at page 4412 of the report, it is headed "Competitive Position on Plain Sheeting Sales."

It reads:

"Distribution of plain sheeting sales as between our competitor, the Sylvania Industrial Corporation, and ourselves remained relatively steady during the 21-months period ending September 30, 1934 with a slight improvement noted in the competitor's position beginning with 1934.

4872 "In considering the volume for the first nine months of 1934, Sylvania's estimated sales of 2,356,300 pounds for that

period represented 20.6% of the combined plain tonnages compared to Du Pont's total of 9,122,500 pounds or 79.4%. In the corresponding period of 1933 the competitor is credited with sales of 2,072,400 pounds or 19.6% of the total volume, during which period our own sales were 8,530,700 pounds or 80.4%. So far as the ratio of their volume to our own is concerned it may be said very little change has taken place in these comparative periods."

4873 Turning now to the next page, page 2 of the report, or 4413 of the bound volumes, we see at the top of that page a tabulation of the sales between Du Pont and Sylvania in plain sheeting, with the percentages set forth.

Continuing our reading of this document at page 12, or 4423 of the bound volumes, in the middle of the page, under the heading "Distribution Between Plain and Moistureproof Sales":

"As a matter of interest, we have noted below the percentage distribution between Sylvania's plain and moistureproof sheeting compared to our own. This tabulation shows a substantially larger proportion of our business in the moistureproof classification. This, of course, is because we have practically all of the business in the cigarette industry, and Sylvania has no comparable unit of business. However, by deducting our sales to the cigarette industry from our moistureproof total, it is found Sylvania's ratio as between plain and moistureproof business closely approximated Du Pont's distribution in 1933. This close correlation may be regarded as normal, since the competitor is selling the same outlets we are."

The next document has previously been offered—

Mr. GESELL. If I may interject, so I understand the position, your Honor, is the Government contending that these figures are correct, because they are grossly different than the figures they have offered as to the actual relationship between these prod-

4874 ucts in earlier exhibits. Du Pont estimates about 3,000,000 pounds off on Sylvania's sales, and I think it should be pointed out to the Court which of the two groups the Government is relying on.

Mr. MINICUS. The Government is definitely relying in the final analysis upon the statistical material that it has previously submitted in response to interrogatories to the Du Pont Company, in response to inquiries directed to the Sylvania Company. These are figures, and we have admitted all the way through in these documents, whereby Du Pont based their compilations and their comparisons upon an estimate of Sylvania's production. And we admit that these are Du Pont's estimates that are in these documents, and they are not absolutely accurate to the pound; there is no doubt about that. There is a discrepancy.

Mr. GESELL. A hundred per cent discrepancy—they were about 100 per cent off. That is the point I wanted to make. I wouldn't mind a minor discrepancy, but this is a major one.

Mr. MINICUS. Well, if the discrepancy is that great, I still don't think it is important. We are not putting them in, your Honor, to show definitively what the relationship is between Du Pont percentages and Sylvania's percentages. That material is already in evidence and is quite authoritative, and we will carry it further later this week in the testimony of our witness to show exactly what these percentages are. Here we are simply reading
4875 the Du Pont documents and we admit that they are estimates and we are not setting them down as definite ratios to be considered between Du Pont's sales and Sylvania's sales but simply Du Pont's statement of what they estimate the situation is.

Most of the time we believe that Du Pont's estimates are reasonably accurate, and the reason for our belief will be apparent as the case develops, but right now, no, we are not submitting these as the actual estimates but we are simply submitting them to show where certain large portions of this direct sale business are.

The COURT. Well then, am I to understand that you are to utilize the figures appearing on the writing which you now have? Do you intend to use those figures?

Mr. MINICUS. We do not intend to use those figures.

The COURT. Then why encumber the record with them?

Mr. MINICUS. Because this material is being put in for another purpose. The figures are an integral part of the material, but there is no way of reading this without also reading what Du Pont's estimates are of the percentages. But it is this sort of material that we are trying to get into evidence turning back to——

The COURT. Well, can you tell me this: What does this piece of the mosaic do to your case, the panoramic picture of your case? Should it be put up there on the wall or should it be thrown
4876 in the waste-basket? That is the short of the matter.

Mr. MINICUS. This most definitely is an important and integral part of our case, your Honor.

The COURT. How can it be if it is inaccurate?

Mr. MINICUS. Because we are not putting it in for the figures; we are simply putting it in to show where the large shares of the business lay on direct sales. I don't think there is any question about that.

The COURT. All right, for the purposes stated, read on.

Mr. MINICUS. I had just finished reading from page 12 of Exhibit 5001. I would just like to stop for a moment and expand on this point. I was looking for it a moment ago. In the middle of that paragraph I have just read, we see this: "This, of course, is because we have practically all of the business in the cigarette in-

dustry, and Sylvania has no comparable unit of business." It is a statement like that that we are relying on at the present time, not these estimates that also appear in the body of the reports.

Mr. GESELL. But you will see, your Honor, the statement relates to an assumed promise of the relationship between plain and moistureproof which his other figures show is not correct.

Mr. MINICUS. They are not our statements, your Honor, but the statements of the defendant. They are admittedly
4877 estimates and we believe they are fairly good estimates.

The COURT. Well, Mr. Gesell says that they are one hundred percent off. I would not say that was a fairly good estimate.

Mr. MINICUS. I have not found any figures yet, your Honor, in this case where duPont has estimated in error to the extent of one hundred per cent.

Mr. GESELL. The figure shown is 2,750,000, whereas the Government exhibit shows the actual figure was 5,018,000.

The COURT. Well, I think the record contains sufficient cautionary statements from me to review this particular evidence in what light it should be accepted. Proceed.

Mr. MINICUS. The Government has previously offered in evidence Government Exhibit 443, which is the annual competitive report for the year 1934, beginning at page 5787 of the bound volumes. Reading from page 5 of the report, or page 5792, the middle of the page, under the heading "Industry Gains":

"Greatly increased purchases by the baking industry, increased cigarette production, and as a consequence a greater demand for transparent wrappers and increased usage on smoking tobacco packages were the chief factors in boosting transparent sheeting production in 1934.

"During 1934 Du Pont continued intensively to promote
4878 the use of transparent sheeting in the baking trade, especially for the wrapping of variety breads and sweet dough products, and as a result of this program we have substantially increased our volume through this outlet. Coincident with our own activity along these lines and the further acceptance of transparent sheeting by bakers as a whole, Sylvania likewise substantially increased their sales to the baking trade.

"Regarding Du Pont's sales to the industry, it is significant to note that when combining our direct sales and our agents' and converters' sales to bakers, this market now heads the list of Cellophane users. While the baking trade has been a volume user since the introduction of moistureproof Cellophane, its steadily increasing importance is manifested by the fact that in 1934 it has surpassed the cigarette trade as the major consuming outlet for Cellophane.

"The next largest industry gain was in the cigarette field where sales increased between 6% and 7% over the 1933 volume, due to greater cigarette consumption. Manufacturers of the leading brands are using Cellophane, and we are securing practically the full potential offered by this industry. Therefore, any fluctuation in sales would be due to changes in the production of cigarettes as a whole."

4879 The Government has previously introduced in evidence Government's Exhibit No. 78, page 266, which is an annual competitive report for 1937. Referring to page 2 of the report, or page 268 of the bound volume, reading from the second full paragraph on page 268:

"To show the factors responsible for the competitive gain by duPont, the discussion which follows provides a condensed description of our operations and conditions in the various industries served by both companies during 1937. As a basis for analysis, we have tabulated detailed comparative statistics showing duPont and estimated competitive sales by industry for 1936 and 1937. The use of plain and moistureproof sheeting is to a large degree mutually exclusive in a majority of the consuming industries so that for all practical purposes total industry figures will suffice for comparative study."

And then again follows another table based upon duPont's estimates of their proportionate share of the market.

Referring now to the bottom of page 269, "Industry Discussion":

"Cigarettes:

"Official figures on the output of cigarettes for the full year 1937 show a gain of 6.2% over 1936. Sales of 'Cellophane' advanced 4.0%. Competitive volume increased an estimated 35.5%, the result almost entirely of securing a greater share of the

4880 business of R. J. Reynolds Tobacco Company, particularly in the latter half of 1937 when inroads made by duPont in other industries appreciably restricted the competitor's volume. In this connection, there has been considerable recent evidence coming from the field of efforts by the competitor to bolster his relatively weaker position in moistureproof sales by more active solicitation of large units of business in the tobacco industry.

"The Reynolds' loss, which developed about the middle of 1935 as a result of production difficulties with duPont sheeting [particularly brittleness], represents the competitor's largest single unit of consumer business. Despite strenuous efforts to displace the competitor with this account, the attitude of the customer—since his difficulties—has been that more than one source of supply is desirable and it has not been possible to re-establish our former 100% relationship. The continuing loss represented by the

Reynolds' business is estimated to have totalled 1,170,000 pounds in 1937 compared to a volume under 900,000 pounds in 1936.

"Other cigarette manufacturers using competitive sheeting are American Tobacco Company, for two minor brands, and Stephano Brothers, in small quantity mainly for test purposes."

Now, until this report which is for 1937, the documents
4881 have indicated that in the cigarette industry duPont had practically all of the business up until this time, but now about 1935 Reynolds experienced considerable quality difficulties with duPont cellophane, and that was the first wedge that Sylvania was able to drive into duPont's cigarette business. We have seen through the tabulations previously offered that Reynolds ultimately became Sylvania's most important customer on direct sales.

At this time the document states the American Tobacco Company, a tremendous user of cellophane, is also using Sylvania cellophane for two minor brands, and Stephano Brothers are using it for test purposes. The document shows no other recourse by the cigarette companies to Sylvania cellophane.

The Government has previously introduced Government Exhibit No. 79, appearing at page 278. This is an annual competitive report for 1938. Commencing reading on page 2 of the report, or page 280 of the bound volumes, beginning with the next to the last full paragraph on page——

The COURT. Is this still Government Exhibit 78?

Mr. MINICUS. This is 79, beginning at page 278.

"It is a policy of many of our larger customers not to confine requirements to any one supplier unless there is a difference in price which, in effect, obtained in our favor under quantity purchase agreements. Sylvania's guarantee of indemnification
4882 nullified this advantage and eliminated, to a considerable extent, grounds on which the competitor's solicitation had been rejected previously.

"On the other hand, the competitor has not been particularly vulnerable to retaliation on the basis of two sources of supply strategy since there are few large units of business held by him exclusively. Those accounts where the competitor does secure the larger share or entire volume are held through unusual considerations in the form of special deals contrary to our policies or on a basis it is felt would be demoralizing to our own structure were we to do likewise."

The COURT. Could I interrupt at that point, Mr. Minicus?

Mr. MINICUS. Certainly, your Honor.

The COURT. Is the use of the word "competitor" in these documents meant in its generic sense or is it applicable to just one actual competitor?

Mr. MINICUS. I have always read the documents to mean it meant only Sylvania.

The COURT. I see. Proceed.

Mr. MINICUS. There is a difference we are coming to at the present time. When they speak of competitive business they speak here of Sylvania's customers. For example, beginning reading at the top of page 281:

4883 "Principal competitive business in this classification is the Freihofer Baking Company, American Chicle Company, Quality Bakers (a purchasing syndicate), and printed transparent sheeting bought by Swift & Company through the competitive converter, Daniels Manufacturing Company.

"Despite the competitor's tactics, we have been able to keep the greater share of the business of most major users of transparent sheeting through a sales program directed toward impressing the trade with the superior quality of our product, and the dollar value of creative merchandising and technical service provided by our organization.

"Next Sylvania has continued to supply 'seconds' in volume apparently far beyond normal run. This was of particular importance during 1938, since the quantity of second grade sheeting available from our own production was materially reduced through refinements in manufacture. Sales of second grade sheeting by duPont decreased 964,000 pounds in 1938, of which it is estimated approximately 30% was absorbed by competitive production. The balance of this decrease may be ascribed to a change-over to first grade material and adverse effects of the business recession.

"To cover specifically the situations wherein the competitor was able to displace duPont business and improve his relative position, the discussion which follows provides a condensed de-

4884 scription of conditions in the more important consuming industries served by both companies in 1938. As a basis for analysis, we detail below comparative figures showing duPont and estimated competitive sales by industry for 1937 and 1938:"

Thereafter following is another table showing duPont's estimated participation in the total consumption for the various outlets: cigarettes, cigars, tobacco, candy, baked goods, meat, and so on.

Resuming our reading now from the bottom of page 5, or page 285, under the heading "Cigarettes":

"Cigarette production advanced 6% in 1938. Sales of 'Cellophane' increased 2.4% and the competitor secured an increase of 9.8% on the small proportion of the total business he enjoys.

Sylvania's gain was principally the result of securing an additional volume, tentatively placed at 100,000 pounds, from the R. J. Reynolds' account. Du Pont sales to Reynolds for cigarettes decreased 196,000 pounds, the combined result of competitive loss and lowered business volume. The only new loss in this industry was a 10,000 pound order sold to Brown & Williamson on a test basis.

"Sylvania continues to supply requirements on two minor brands (Pall Mall and Herbert Tareyton) for American Tobacco Company, and a volume of about 25,000 pounds annually to Stephano Brothers on a two-source of supply basis.

"Contributing to increased sales by duPont was the growing popularity of brands produced by several manufacturers
4885 using duPont material only and adoption of 'Cellophane' by Brown & Williamson for 'Wings' late in the year, the last important unit not wrapped."

The Government has previously offered in evidence Government Exhibit No. 80 at page 292 of the bound volumes. This is an annual comparative report for 1939. On page 3 of the report, or page 294 of the bound volumes, commencing with the first full paragraph on the page:

"Considering duPont's percentage of the total business increased from 78.2% in 1938 to 79.1% in 1939, it may be calculated our improved proportion of total business has meant a net gain from the competitor of approximately 857,000 pounds in 1939.

"The importance of this gain can be visualized best by a brief retrospect into previous years, and more particularly by considering the 1938 situation:

"Sylvania has made consistent inroads into business developed by us over a period of time—especially during the past five years. During this period there has been a tremendous expansion of mechanized wrapping, of which we have been the principal beneficiary. This development, however, contributed heavily to our vulnerability in two directions.

"First, mechanized wrapping has required numerous modifications in the manufacture of transparent film. Where originally there was a problem of producing sheeting of
4886 maximum transparency and performance at the ultimate point of sale, mechanization of wrapping has added to problems of providing a material adapted to machine handling and maintaining a satisfactory return on rapidly growing volume.

"Efforts to maintain a proper balance between these various factors led to certain situations where the competitor's product provided superior performance in specific characteristics. Defi-

ciencies in quality thus opened the way for an alternative source of supply."

In other words, where Sylvania was able to get into certain of these large industrial outlets, quality was a very important factor.

Mr. GESELL. This was not in relation to industrial outlets necessarily; this relates to all the business. You are interpolating again.

Mr. MINICUS. I presume that industrial outlets are included within all the business.

4887 Mr. MINICUS. Continuing to read:

"Second, creation of large units of business with individual accounts combined with the quality problem to force important customers to divert a proportion of their requirements to more than one supplier as a matter of purchasing policy.

"In 1938 Sylvania made a series of raids against our larger units of business, offering inducements in the form of guarantees against loss on quantity rebates which these customers expect to earn in purchases from us.

"Against these tactics, there was little opportunity for retaliation: the large units of business—except for ten or twelve—were already in our hands and we were in a vulnerable position."

The COURT. Tell me this, Mr. Minicus: Are these competitive reports anything other than orthodox business methods of keeping track of one's product in relation to the product of others which are in competition——

Mr. MINICUS. Not in our opinion, no, sir. We are simply introducing this evidence——

The COURT. Do you think a good business man would try to keep this market in motion, in growth, with relation to the public if he did not indulge in such——

Mr. MINICUS. Absolutely not. We are not maintaining there is anything wrong with this, simply because they bear the name, competitive reports. We are simply getting into

4888 the record certain contents of these competitive reports that will in time provide the basis for other portions of our case.

We are showing here, for example, that the cigarette business was largely, as they said here, in the hand of the Du Pont Company.

Now, I prefaced this entire study that we are engaged in at the present time with the statement that here we are only considering status. How that status has been acquired will be considered in great detail at a subsequent portion of our case.

We attempted to show in the indirect sales that large numbers of these very important converters were exclusively Du Pont cus-

tomers. Here we are attempting to show at the direct sales level again that very large lumps of this business were either exclusively Du Pont business or virtually exclusive Du Pont business. Now, how it got to be that way we intend to explore in great detail at a subsequent point. And the fact that these exhibits are named competitive reports, we are really not maintaining there is anything wrong with that at all. It is only the information contained in the exhibits that we are interested in.

These are reports that were drawn up annually considering in great detail the operations of the defendant company in relation to the operations of the only other manufacturer of Cellophane, the Sylvania Corporation.

4889 The COURT. Now, I may seem very naive in the questions I ask, Mr. Minicus, and perhaps that is an apt description of it, but if Du Pont had a commodity that it was selling and there was a competitor, why shouldn't they have kept watch on him? I mean, where does this fit into your condemnation of illegality?

Mr. MINICUS. Only, your Honor, that the information in these reports shows and have shown all the way through here that Du Pont had more, at this time, than its proportionate share of the cigarette business. At one time they controlled almost the entire amount of the cigarette business. Slowly that is breaking down. We intend to approach a point where we will see how much it has broken down, and then later on we will show why these cigarette companies gave so much of their business to the Du Pont Company.

The COURT. Proceed.

Mr. MINICUS. The Government offers in evidence Government Exhibit 5395—I would like to withdraw that, please—the Government offers in evidence Government Exhibit 5023, appearing at page 4462.

(Memorandum headed "Quantity Discounts Post War" was received in evidence and marked "Government's Exhibit No. 5023.")

Mr. MINICUS. This memorandum is headed "Quantity Discounts Post War."

Mr. GESELL. Who did you say wrote it, Mr. Minicus?

4890 Mr. MINICUS. I think that will be established by the other exhibit that I mentioned, which it will now be necessary to offer in evidence, Government Exhibit 5395, from Mr. Brown to Mr. Richards.